Supreme Court, U. S.
FILED
NOV 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-6821

SANTA CLARA PUEBLO, et al, *Petitioners.*

v.

JULIA MARTINEZ, et al, *Respondents,*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November, 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This case raises the following question: Does the Indian Civil Rights Act, 25 U.S.C. §§ 1301-3 (1968), waive all sovereign immunity of Indian Tribes from suit in federal courts and vest federal courts with jurisdiction to determine questions of tribal membership?

The 10th Circuit Court of Appeals has interpreted the Act in such broad fashion as to completely annihilate and destroy the long-standing sovereign immunity of Indian tribes, thus destroying the internal sovereign right of Indian tribes to determine their own membership; a right which has been established and protected by decisions of the Supreme Court of the United States for over one hundred years.

Because of the threat to continued existence of all Indian tribes explicit in the ruling of the Court of Appeals, Santa Clara Pueblo petitions for Writ of Certiorari to review the judgment of the 10th Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Federal District Court for the District of New Mexico is reported as *Martinez* v. *Santa Clara Pueblo,* 405 F.Supp. 7 (D.N.M.1975) and is reproduced in the Appendix to this Petition. pp. 1(a)-27(a). The opinion of the 10th Circuit Court of Appeals No. 75-1615 is reproduced in the Appendix at pp. 28(a)-45(a).

JURISDICTION

The Judgment of the 10th Circuit Court of Appeals was entered on August 16, 1976.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Indian Civil Rights Act, 25 U.S.C. §§ 1301-3 (1968) vest federal courts with jurisdiction to determine questions of tribal membership?

2. Does the Act waive the sovereign immunity of Indian tribes to suit in federal courts?

3. Does the Act sub-silentio terminate the quasi-sovereign status of Indian nations as it has been known heretofore?

4. If the Act vests federal courts with jurisdiction to resolve Indian tribal membership questions, what legal standard of equal protection should be applied?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

THE INDIAN CIVIL RIGHTS ACT, 25 U.S.C. §§ 1301-3 (1968) § 1301. *Definitions.*

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense. (Pub.L. 90-284, title II, § 201, Apr. 11, 1968, 82 Stat. 77.)

§ 1302. *Constitutional Rights.*

No Indian tribe in exercising powers of self-government shall—

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

§ 1303. *Habeas Corpus.*

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United

States, to test the legality of his detention by order of an Indian tribe.

(Pub. L. 90-284, title II, § 203, Apr. 11, 1968, 82 Stat. 78.)

The Constitution of the Santa Clara Pueblo.

Article II—Membership

Section 1. Conditions of membership.—The membership of the Santa Clara pueblo shall consist as follows:

(a) All persons of Indian blood whose names appear on the census roll of the Santa Clara pueblo as of November 1, 1935, provided that within one year from the adoption and approval of this constitution corrections may be made in the said roll by the pueblo council with the approval of the Secretary of the Interior.

(b) All persons born of parents both of whom are members of the Santa Clara pueblo.

(c) All children of mixed marriages between members of the Santa Clara pueblo and nonmembers, provided such children have been recognized and adopted by the council.

(d) All persons naturalized as members of the pueblo.

Section 2. Naturalization.—Indians from other pueblos or reservations who marry a member of Santa Clara pueblo may become members of the pueblo, with the assent of the council, by naturalization. To do this they must (1) go before the pueblo council and renounce allegiance to their tribe and declare intention of becoming members of the Santa Clara pueblo. They shall swear that from that date on they will not receive any benefits from their people, except through inheritance. (2) A year later they shall go before the pueblo council

again, swear allegiance to the pueblo of Santa Clara and receive membership papers; provided, they have kept their promise from the time of their first appearance before the pueblo council.

Article VII—Land

Section 1. Pueblo title.—Title to all lands of the pueblo, whether assigned to the use of individuals or withheld from the common use of the members of the pueblo, shall forever remain in the pueblo itself and not in the individual members thereof. All the members of the pueblo are declared to have an equal right to make beneficial use, in accordance with ordinances of the council, of any land of the pueblo not heretofore or hereafter assigned to individual members.

For the purpose of this article the word "member" shall be defined by the council.

Section 2. Individual rights of possession.—The right of full possession shall be guaranteed to every member of the pueblo, holding lands assigned to him by the Pueblo Council, for cultivation or other purposes: Provided, That no member holding said lands shall sell or will same to an alien. All lands assigned to individuals of the pueblo must be completely fenced within three years. Any violation of the above provision shall be sufficient cause for the council to dispossess him of said land. He shall have the right, however, to rent to a pueblo member or, with the approval of the council, to an alien, all lands under his possession, for a term not to exceed two years. He shall have the right to sell his interest in said lands to any other member of the pueblo after his assignment has been finally approved, subject to such regulations as the council may prescribe.

Section 3. Council to have power of granting assignments.—When any member of the pueblo de-

sires a piece of unimproved pueblo land, he shall select his land, and then make his application for same to the council of the pueblo. If the council decides to grant him the land or any part thereof, they shall mark out the boundaries of same. The grantee shall thereafter have full possession of said land, unless the council shall, in accordance with the constitution, bylaws, and ordinances of the pueblo, dispossess him of the same.

Section 4. Prior assignments recognized.—All assignments of land heretofore made by the pueblo authorities are hereby recognized and confirmed.

THE 1939 ORDINANCE

December 15, 1939

Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

STATEMENT OF THE CASE

Proceedings Below

This case involves application of Section 1302(8) of the Indian Civil Rights Act to the Santa Clara Pueblo Tribal Membership Ordinance of 1939. It was alleged by the Plaintiffs that the Ordinance is discriminatory and contrary to said Section of the Act. Suit was filed by Plaintiffs September 22, 1972, in the Federal District Court for the District of New Mexico. The Defendants raised the defenses of lack of jurisdiction, sovereign immunity, failure to exhaust tribal remedies and others. Motions to dismiss were denied by the district court. Trial to the Court without a jury was held on November 25 through 27, 1974. Judgment in favor of the Defendants was entered by the district court on June 25, 1975. The Courts findings and conclusions are contained in its memorandum opinion, App. pp. 1(a)-27(a). Notice of Appeal was filed by Plaintiffs on July 17, 1975. The 10th Circuit Court of Appeals reversed the trial court and remanded the case for further action on August 16, 1976.

Facts

Santa Clara Pueblo is a Pueblo Indian Tribe that has been traced back at least seven hundred years as a distinct cultural group. It has been situated on the banks of the Rio Grande at its present location at least three hundred years. R.pp. 234-235. "Since 1680 the Pueblo has existed as a conquered people, identifiable as a group but surrounded by an alien culture, first Spanish and later American." (Memo. Op. App. p. 19(a).)

Santa Clara Pueblo is an Indian Reservation located in Northern New Mexico with sovereign powers of

self-government over its territories and its people. In 1935 the Pueblo adopted a written Constitution and By-Laws pursuant to the Indian Reorganization Act of 1934. (25 U.S.C. § 476 (1934).)

Plaintiff, Julia Martinez, is a member of the Pueblo, both of her parents having been members. Her husband, Myles Martinez, is a Navajo Indian R.p. 346. The Martinez' have lived at Santa Clara Pueblo since 1941 with the exception of a period when Mr. Martinez was in the military service. The Martinez' have raised ten children on the Pueblo, eight of whom are living. Plaintiff, Audrey Martinez, is the eldest daughter of the Martinez'. All of the Martinez children speak and understand Tewa, the traditional language of the Pueblo. The children were raised at the Pueblo and made it their home except for periods away at school. Memo. Op. App. p. 17(a). These children are presently barred from Pueblo membership by the Ordinance of 1939.

The Martinez children now live on land belonging to their mother, Julia. Julia Martinez is prohibited from conveying or devising her land to any non-member of the Pueblo. Non-members are not allowed to vote in Pueblo elections and they are not allowed to hold office as secular officials of Santa Clara Pueblo. Memo.Op. App. p. 17(a).

The Pueblo holds all of the land within the Pueblo's boundaries in fee simple title in common. Individual members, however, are granted possessory interests in tracts of land which they may pass on to their descendants. The devolution of the possessory interests does not diminish the Pueblo's superior proprietory right. Ct.App.Op. App. p. 31(a).

The denial of tribal membership does not in any way affect the Martinez' entitlement to participate in federal benefits accorded Indians generally. Memo.Op. App. p. 18(a).

All the Martinez children are entitled to full benefits from the Bureau of Indian Affairs regardless of their lack of membership in the Santa Clara Pueblo. The children all have census numbers and are receiving complete medical and educational benefits. R.pp. 25, 61-63. The Martinez children have all the material rights that full members of the Santa Clara Pueblo have. R.p. 64. Even Mr. Martinez, a Navajo, has all the privileges that members have, such as irrigation water, farming, wood-hauling, fishing and hunting. R.p. 15.

Santa Clara Pueblo has consistently taken the position that the 1939 Ordinance is simply a written embodiment of a preexisting unwritten rule of membership that has been in existence from time immemorial. R.pp. 109, 153, 208. Further that the said Ordinance is essential to the cultural and religious heritage that is vital to the Tribes existence. R.p. 117.

Mrs. Julia Martinez was fully aware of the consequences if she married a non-Santa Clara male. R.p. 66. She was told by her uncle that if she married a non-member of Santa Clara Pueblo her children could not be enrolled. The children can be enrolled in the Navajo Nation is desired. R.p. 22.

Julia Martinez has attempted to enroll her children in the Pueblo since 1946. The District Court found that she had exhausted all remedies within the tribal system.

The record fails to show that the Pueblo has varied from the Ordinance under attack. There have been

no exceptions to the Ordinance since its enactment. The District ruled that "the 1939 Ordinance does not violate the restrictions of 25 U.S.C. §§ 1302(8) and Plaintiffs have not been denied the equal protection of the laws within the meaning of the Indian Civil Rights Act." Memo. Op. App. p. 25(a). The District Court's Memorandum Opinion was filed June 25, 1975. On July 17, 1975, the Plaintiffs filed their Notice of Appeal to the 10th Circuit and on August 16, 1976, the 10th Circuit Court of Appeals entered judgment reversing the lower court and remanding the case for further proceedings.

REASONS FOR GRANTING THE WRITS

1. THE SANTA CLARA PUEBLO IS IMMUNE FROM SUIT IN FEDERAL COURTS ABSENT EXPRESS CONGRESSIONAL AUTHORIZATION

In considering this petition, a basic premise concerning tribal government must be considered which is that an Indan tribe recognized by the Federal Government, such as Santa Clara Pueblo, is exempt from direct suit in Federal courts without express Congressional authorization. *United States* v. *United States Fidelity Company,* 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894, (1940); *Twin Cities Chippewa Tribal Council* v. *The Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967); *Iron Crow* v. *Oglala Sioux Tribe,* 213 F.2d 89 (8th Cir. 1956). The sovereign immunity of Indian tribes from suit in Federal Courts cannot be assumed.

The 8th Circuit Court of Appeals in *Thebo* v. *Choctaw Tribe of Indians,* 66 F. 372 (8th Cir. 1895), held that statutory authority necessary to subject a tribe to jurisdiction of the federal courts must be "expressed

in plain and unambiguous terms." The 10th Circuit Court of Appeals has stated that jurisdiction over an Indian tribe in federal court does not exist "unless jurisdiction is *expressly* conferred by Congressional enactment." (Emphasis supplied)—*Native American Church, etc.* v. *Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959) at 131. The Civil Rights Act contains no language indicating congressional intent to waive the sovereign immunity of a tribe nor does it specifically grant jurisdiction to bring suit against Indian tribes. The principal that waiver of sovereign immunity must be founded upon express language and cannot be based upon implication has been reaffirmed in recent cases. *United States* v. *King,* 395 U.S. 1 (1969); *Hamilton* v. *Nakai,* 453 F.2d 152 (9th Cir. 1972).

As previously indicated, Congress has never expressly waived sovereign immunity of Indian tribes from suit in federal courts by conferring jurisdiction upon the courts to determine tribal membership questions. The 10th Circuit Court of Appeals did not at any time consider the question of non-waiver of sovereign immunity from suit. However, the Court held that 28 U.S.C. § 1343(4) provides the necessary jurisdictional basis. In doing so the 10th Circuit Court of Appeals has decided a crucial question of federal law which has not been but should be settled by the Supreme Court. The decision in itself conflicts with *United States* v. *United States Fidelity Co., supra; Roff* v. *Burney,* 168 U.S. 218 (1897); *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, (1903), and other decisions of the Supreme Court.

The 10th Circuit ignored completely the admonitions of the Supreme Court in *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 172 (1973) that federal

statutes must be read against a backdrop of the doctrine of tribal sovereignty. "It must always be remembered that the various Indian tribes were once independent and sovereign nations and that their claim to sovereignty long predates that of our own Government." 411 U.S. at 172. The court went on to quote from *United States* v. *Kagama,* 118 U.S. 375, 381-2 (1886). "They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union of or the State within whose limits they resided."

2. THERE IS NO PROVISION FOR JURISDICTION IN THE FEDERAL COURT UNDER THE INDIAN CIVIL RIGHTS ACT

Jurisdiction of the Court was sought to be invoked against the Pueblo and its Governor pursuant to Titles 28 U.S.C. §§ 1331(a) and § 1343(4) and 25 U.S.C. §§ 1302-8. The courts below have borrowed jurisdictional authority from other Statutes predating the Indian Civil Rights Act and have borrowed a legal doctrine from civil rights cases to authorize an unlimited and wholly inappropriate scope of relief. Those federal courts that have recognized the problem of sovereign immunity of Indian tribes have overcome this obstacle by concluding that the Indian Civil Rights Act, by implication, sub-silentio abrogated tribal sovereign immunity and constitutes authority by Congress to bring such actions. *Loncassion* v. *Leekity,* 334 F. Supp. 370 (D.N.M. 1971); *Johnson* v. *Lower Elwha*

Tribal Community, 484 F.2d 200 (9th Cir. 1973). If we accept the premise that sovereign immunity cannot be waived by implication these decisions cannot be justified, nor can the decision of the Court of Appeals in this case. This decision is a departure from prior Supreme Court decisions and should be reviewed by the Supreme Court. If sovereign immunity is to be taken from the Indian tribes it must be taken by the legislative branch of the Government and not the judicial branch. The sovereign immunity of Indian tribes from suit cannot and has not been destroyed by implication. Titles 28 U.S.C. §§ 1331 and §§ 1343(4) are wholly insufficient to sustain jurisdiction against Indian tribes under the Indian Civil Rights Act.

3. THE DETERMINATION OF TRIBAL MEMBERSHIP OF THE SANTA CLARA PUEBLO IS AN INTERNAL SOVEREIGN RIGHT OF SANTA CLARA PUEBLO, AND NOT SUBJECT TO CONTROL BY THE FEDERAL COURTS

The most basic and fundamental sovereign right of any Indian tribe is its complete and absolute authority to determine all questions of its own membership as a political entity. *Roff* v. *Burney, supra; Martinez* v. *Southern Ute Tribe of the Southern Ute Reservation,* 249 F.2d 915 (10th Cir. 1957).

The power of an Indian tribe to determine with total authority, all questions of its own membership including the power to revoke rights of membership which it has granted has been recognized by the Supreme Court. *Roff* v. *Burney, supra.* The trial court recognizing the importance to the tribe of having the authority to decide its membership stated; "Membership policies present the same interests on a different level. They are no more or less than a mechanism of social, and to an extent psychological and cultural,

self-definition. The importance of this to Santa Clara or to any other Indian tribe cannot be overstressed. In deciding who is and who is not a member, the Pueblo decides what it is that makes its members unique, what distinguishes a Santa Clara Indian from everyone else in the United States. If its ability to do this is limited or restricted by an external authority, then a new definition of what it is to be a Santa Claran is imposed and the culture of Santa Clara is inevitably changed. Memo. Op. App. p. 20(a).

Federal Courts have never been granted express jurisdiction by Congress to consider tribal membership questions. Accordingly, the Supreme Court held in *Lone Wolf* v. *Hitchcock, supra* at 172. "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the Beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

It is clear that prior to the passage of the Indian Civil Rights Act, federal courts did not have jurisdiction over Tribal enrollment matters. *Martinez* v. *Ute Tribe, supra.*

Felix S. Cohen in Cohen, Handbook of Federal Indian Law, p. 133, Section 4. (1942) stated:

> "The Courts have consistently recognized that in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership . . . .
>
> The power of an Indian tribe to determine questions of its own membership derives from the character of an Indian tribe as a distinct political entity."

There having been no express Congressional enactment granting federal court jurisdiction over internal tribal matters, prior decisions of the Supreme Court require that the Supreme Court rule on this issue in view of the decision reached by the 10th Circuit Court of Appeals.

4. CONGRESS HAS ACTED IN THIS AREA. BUT HAS FAILED TO EXPRESS ANY INTENT THAT TRIBES NOT DETERMINE THEIR OWN TRIBAL MEMBERSHIP

Admittedly, while the federal courts do not have such authority, Congress has in fact, plenary power to establish laws concerning questions of tribal membership. *Lone Wolf* v. *Hitchcock, supra.* Congress has exercised its plenary authority in this area in a variety of ways. Congress has delegated to the Secretary of the Interior general authority to approve final tribal rolls for purposes of dividing and distributing tribal funds. 25 U.S.C. § 163, § 1300-d-3-4. However, even the broad general power of the Secretary over tribal rolls is not without limitation, as stated by the solicitor of the Department of the Interior in an Opinion dated December 18, 1937: ". . . while the Department may approve or disapprove adoptions into the tribe and expulsion therefrom made by the tribal authorities, no case holds that the Department, in the absence of express statutory authorization, may grant a person tribal membership over the protest of the tribal authorities."

"Whatever may be the exact extent of departmental power in this field, in view of the broad provisions of the Wheeler-Howard Act, it has been administratively held that the Secretary of the Interior may define and confine his power of supervision in accordance with the terms of the Constitution adopted by the tribe itself and approved by him." Cohen, Federal Indian Law at 421.

The Secretary has approved the Constitution and By-Laws of the Santa Clara Pueblo. Article 2, Section 2 of The Santa Clara Pueblo Constitution specifically grants the Council of Santa Clara Pueblo the power to determine which children of mixed marriages should be recognized as members of the Pueblo and it further provides (Article 7, Section 1) that the Council shall determine who is a member for purposes of dealing in land and land use rights. The 1939 Ordinance was enacted by the Council, pursuant to these Constitutional powers.

The Governmental function of an Indian tribe in adopting members is analogous to the naturalization of citizens by the United States. Indeed, the Supreme Court has referred to tribal enrollment as "Indian naturalization." *Cherokee Intermarriage Cases,* 203 U.S. 78 (1906). That description is particularly apt because the absolute discretion of an Indian tribe to determine requirements for enrollment in the tribe is as broad as that of the United States to determine the requirements for naturalization. An alien has no inherent right to naturalization and Congress may refuse or may grant naturalization upon any conditions it may prescribe. "No alien has the slightest right to naturalization unless all statutory requirements are complied with . . . ." *United States* v. *Ginsberg,* 243 U.S. 472 (1917). Indeed during one period in the history of our country a child born outside the continental United States, whose father was a citizen of the United States was granted citizenship but if the mother were a citizen of the United States the child was not granted citizenship. In view of the fact that Congress has acted in the area of tribal membership before, it seems even

clearer that had Congress intended to destroy tribal sovereignty it would have done so in an affirmative fashion and not by implication.

5. THE LEGISLATIVE HISTORY OF THE ACT

Had the 10th Circuit Court of Appeals followed the clear guidance of the Supreme Court it would have ruled that the Indian Civil Rights Act and its legislative history show no indication that Congress intended to waive sovereign immunity of Indian tribes from suit in federal courts. Indeed it shows the opposite that Congress affirmatively intended not to waive tribal sovereign immunity. Congress in order to protect civil rights of members of Indian tribes decided to strengthen tribal governments and tribal institutions. Testimony before the Ervin Committee indicated that Indian tribes lacked certain civil rights protections, many not having constitutions or other formal governments.

Congress established a list of civil right guarantees for Indians and Section 1302 (25 U.S.C. 1302) was intended as a guide to Indian tribes in exercising their governmental powers, a guide to the Secretary of the Interior in exercising its supervisory powers and finally a guide to the federal court in habeas corpus proceedings resulting from tribal detentions.

Congress defined "powers of self-government" (25 U.S.C. § 1301(1)) as including all executive, legislative, and judicial powers of all Indian tribes and agencies. Admittedly, all actions of tribal government, whether executive or legislative, are governed by 25 U.S.C. § 1302, and the very act of lending federal sanction to the enumeration of civil rights by Congress is designed to make it clear to Indian tribes that they are no longer free to act without specific restraints.

In 25 U.S.C. § 1301(3), "Indian Court" is defined to include Indian tribal court or courts of Indian offense. Thus, Congress makes clear that all judicial functions of tribal courts, whether criminal or civil, are to be governed by the specific restraints of 25 U.S.C. § 1302.

Section 1303 of the Act is the only section which vests jurisdiction in the federal courts, and it is limited to testing the legality of tribal detention orders. After rejecting earlier drafts of the Act which would have provided de novo review of all criminal actions of tribal courts, Congress nevertheless felt that deprivation of personal liberty was of sufficient importance to require the carving out of an additional page of jurisdiction in federal courts. But even here, Congress did not waive sovereign immunity of *Indian tribes* from suit in federal courts; habeas corpus proceedings are actions directed only at officials who have custody of convicted criminal defendants. (Emphasis Added) This section does not authorize actions against Indian tribes themselves but provides only a mechanism to prevent illegal detention of criminal defendants.

The legislative history of the Act supports petitioner's position. In none of the hearings held upon the Act from 1961 through 1965 was there one word intimating that the Act would waive tribal sovereign immunity, or would vest the federal courts with jurisdiction over questions of tribal membership. *The Indian Bill of Rights and the Constitutional Status of Tribal Governments,* 82 Harv.L.Rev. 1343, 1359; *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 87th Cong., 1st Sess., Part 1 (1961), 87th Cong. 1st Sess., Part 2 (1961), 87th Cong., 2d Sess., Part 3 (1962), 88th Cong., 1st Sess., Part 4 (1963); *The Staff of Subcommittee on*

Constitutional Rights of Senate Committee on the Judiciary, 88th Cong., 2d Sess. (Committee 1964) *Hearings on S.J. Res. 40 to Protect the Constitutional Rights of the American Indian, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 89th Cong., 1st Sess. (1965); *Constitutional Rights of the American Indian, Staff of Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 89th Cong., 2d Sess. (Committee 1966); *Hearings on Rights of Members of Indian Tribes before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs,* 90th Cong., 2d Sess. (1968).

Frank J. Berry, Solicitor of the Department of the Interior recognized that:

> On the other hand, the people of Indian Tribes have their roots in an entirely different culture and it may be that the devices which appropriately protected the interests of the Anglo-American of the late 18th Century may not be appropriate to protect the Indian tribal member of the middle 20th Century. *Hearings on S.961-68 and S.J. Res. 40 to Protect the Constitutional Rights of American Indians before the Subcommittee on Constitutional rights of the Senate Committee on the Judiciary,* 89th Cong., 1st Sess. (1965) p. 17.

Senator Ervin himself expressed Congress' concern for protecting Indian self-government and cultural values by stating:

> The essential problem that confronts the Congress in this field is whether or not it is possible to establish a relationship with our other levels of government for the reservation Indians in a way that will harmonize with our levels of government and yet at the same time preserve for them such

necessary local self-government as would seem to best serve their interest. *Hearings on S.J.Res. 53 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 87th Cong., 1st Sess., Part 1 (1961) p. 19.

Congress did not intend that 25 U.S.C. § 1302 allow invasion by the federal courts into the areas of the essential political structure of Indian tribes. The Act incorporates only selected portions from the federal bill of rights contained in the first ten amendments, and subsection (8) contains an edited version of the language of the 14th Amendment. Nowhere are privileges and immunities of citizens mentioned, nor is any mention made in the Act of the right to vote.

Since determination of membership is an essential political attribute of an Indian tribe, 25 U.S.C. § 1302 should not be construed to have taken that right from the Indian tribes by implication and to have conferred it upon the federal courts.

Returning to the question of federal court jurisdiction generally, one notes that S.962, the earlier version of 25 U.S.C. § 1303, vested the federal district courts with jurisdiction to hear all criminal convictions in tribal courts de novo by a judge and a jury. But these provisions were removed and federal courts were vested with only limited jurisdiction over habeas corpus proceedings. Again Senator Ervin himself recognized this limited effect of the Act in the hearing of April 11, 1969, regarding portions of the proposed S.211 which restated 25 U.S.C. § 1303:

> Senator Ervin. This bill does not provide for the Federal courts to review all the decisions of the Indian courts. In fact, provision for Federal review was in there originally, and at the request of a number of tribes we eliminated that entirely. *The only provision in this bill that provides for Federal court interference is writ of habeas corpus,* and that probably exists as law now, although I am not quite certain. If the man was convicted in violation of a law, the Federal Court would have the jurisdiction to issue a writ of habeas corpus. *Hearing on Title II of the Civil Rights Act of 1968 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 91st Cong., 1st Sess. (1969) p. 15 (Emphasis supplied)

The doctrine of sovereign immunity of Indian tribes is of such long standing and so well known that Congress must have been well aware of it. Yet Congress refrained from any declaration waiving immunity for the purposes of the Indian Civil Rights Act of 1968. When the entire Act is viewed against a backdrop of tribal sovereignty, it becomes completely clear that Congress chose in the Act to proceed in a limited fashion by strengthening tribal governments, encouraging tribal self-determination and yet at the same time preserving the civil rights of tribal members. Congress acted knowing full well that it retained plenary jurisdiction over Indian tribes and that if tribal courts in civil and criminal matters, tribal councils in executive and legislative matters failed to protect the civil rights of tribal members, then Congress could take the more drastic step of vesting the federal courts with additional jurisdiction.

Until Congress takes such additional steps, it is wholly unwarranted for the federal courts to conclude that Congress has sub-silentio waived tribal sovereign immunity. It is especially dangerous to the continued existence of tribal governments for federal courts fo attempt to read 25 U.S.C. § 1302 in conjunction with

28 U.S.C. § 1343(4) in such manner as to throw open the floodgates of litigation against Indian tribal governments. Yet this is exactly what the 10th Circuit Court of Appeals has done.

Most Indian tribes are able to continue functioning as sovereign units of government only because they are able to conserve assets and obtain federal grants for improving and enlarging their governmental functions. Their traditional sovereign immunity from suit in federal courts has protected them from suits which would literally destroy them. To allow the Court of Appeals' decision to stand striking down tribal sovereign immunity is unthinkable in light of the intent of Congress in enacting the Indian Civil Rights Act.

In keeping with the rule that tribal sovereign immunity is not likely to be considered abrogated, this legislative history, especially Senator Ervin's statement of his understanding that 25 U.S.C. § 1303 is the only provision in the Act "that provides for federal court interference," appears to be conclusive of Congress' intent.

6. THE DEVELOPMENT OF CASE LAW UNDER THE ACT

There are 10 sub-paragraphs in 25 U.S.C. § 1302. All but sub-paragraph (8) apply to "any person." Sub-paragraph 8 is limited to "any person within its (tribes) jurisdiction." The tribes jurisdiction is limited to Indians on the Reservation, however, enrollment ordinances potentially apply to eligible members, whether on or off the reservation. Had Congress intended to subject the tribes power to fix membership standards to the equal protection clause, Congress certainly would not have limited the clause to Indians living on the Reservation, the only Indians within the

tribes jurisdiction. This is further proof that sub-paragraph 8 was intended to protect the civil rights of Indians only in the context of the application of criminal justice.

An early 10th Circuit case indicated that the same restraints and restrictions contained in the equal protection clause of the United States Constitution were not to be imposed on Indian tribes pursuant to the Act. *Groundhog* v. *Keeler,* 442 F.2d 674 (10th Cir. 1971).

The 10th Circuit in *Slattery* v. *Arapahoe Tribal Council,* 453 F.2d 278 (10th Cir. 1971), held that the Indian Civil Rights Act was concerned primarily with tribal administration of justice, and the imposition of tribal penalties and forfeitures, and not with the specifics of tribal structure of office holding. Again the 10th Circuit in *McCurdy* v. *Steele,* 353 F.Supp. 629 (D-Utah 1973), rev'd, 506 F.2d 654 (10th Cir. 1974) stated that "Its (the ICRA) guarantees of individual rights should, where possible, be harmonized with tribal cultural and governmental autonomy." p. 633

The Court of Appeals in the case at bar recognized that "the Congressional hearings gave little attention to Constitutional rights other than protection under the criminal law and procedure of individuals in the tribal courts." App. page 37(a). The Court further recognized that before enactment the Act was amended and provisions requiring restraints on blood requirements for membership were rejected as were first amendment, non-establishment clause provisions which would endanger the continued existence of Pueblo theocracies. App. Page 37(a). The Court acknowledged that the deletion of the non-establishment clause in the 15th

Amendment appears to have been in deference to the traditional Indian culture.

All of the opinions to date have paid lip service to the theory of tribal sovereignty. Yet all have glossed over this issue summarily and found that Congress has silently overruled an entire line of cases beginning with *Worcestor* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832).

7. THE EQUAL PROTECTION CLAUSE OF THE INDIAN CIVIL RIGHTS ACT DOES NOT INCORPORATE THE STANDARDS OF THE EQUAL PROTECTION CLAUSE OF THE 14th AMENDMENT AND THE 14th AMENDMENT STANDARDS ARE NOT APPLICABLE TO TRIBAL MEMBERSHIP QUESTIONS

If the federal courts are to take jurisdiction of matters involving tribal membership, then we must ask ourselves what standard is to be applied and what meaning is to be given to the equal protection clause of the Indian Civil Rights Act. The following language expresses petitioners' feelings as to the proper approach to this question.

> So long as the courts continue to operate on the belief that they have jurisdiction to review all facets of Indian tribal government under the Indian Civil Rights Act, it will be necessary for federal judges to develop an understanding of the unique factors which characterize the life of Indian political communities. In the observation of this writer, the most important issues in the mind of Indian people today are tribal autonomy and Indian separatism. The two are intertwined. Often the issue is phrased in terms of "tribal sovereignty:" other times, one hears of the "right to be Indian" . . . Courts should be cognizant of: (7) The tribes' inherent right to determine their own membership must be understood as vital to the survival of these people, and the broadest recognition must be given to the tribes' determination.

> . . . Above all, courts must avoid the unconscious tendency to bring missionary zeal to the task of extending the blessings of our philosophy of individual liberties to Indian tribes and tribal members. *Ziontz, In Defense of Tribal Sovereignty-20,* South Dakota, L.R. 1, 47-48 (1975).

Beginning with *Worcestor* v. *Georgia, supra,* federal courts have adopted a federal judicial doctrine exempting tribal governments from any constitutional restraint in the exercise of power over tribal members. Indian tribes have been recognized as "dependent sovereign nations" with certain attributes of sovereignty which include the power of regulating their internal and social relations. Neither the "Bill of Rights" nor the 14th Amendment are applicable to Indian tribes. *Talton* v. *Mayes,* 163 U.S. 376 (1896); *Native American Church* v. *Navajo Tribal Council, supra.*

In analyzing the Civil Rights Act courts have uniformly held that the equal protection clause of the Act is not subject to the same standard as the Constitutional guarantee of equal protection. *Groundhog* v. *Keeler, supra* and *Lohnes* v. *Cloud,* 366 F.Supp. 619 (D.N.D. 1973).

The Court of Appeals in this case recognized that in an evaluation such as the present one, "the cultural autonomy and integrity of the tribes were entitled to be weighed. . . . At the same time nothing resembling a formula for determining which of these conflicting interests is to prevail has been furnished." App. page 39(a). The court went on to state that the scope, extent and importance of the tribal interest is to be taken into account and that the individual right to fair treatment under the law was likewise to be weighed against the tribal interest.

The Court of Appeals apparently recognized the fact that Congress did not intend to subject a tribe to those requirements which are exacted under the equal protection clauses of the 14th and 15th Amendments to the Constitution of the United States. The court stated that "The Fourteenth Amendment standards do not, however, apply with full force" App. page 42(a), but did not enunciate clear principles or guidelines stating what test is to be applied in cases of this type.

The Court went on to say "But we must still ask: "Is the Tribe justified in deviating from the Fourteenth Amendment standard on the basis that tribal, cultural and ethnic survival would suffer from full-scale enforcement of subsection (8) to these facts? We must hold that the facts do not support the decision that the tribe's interest is compelling." It clearly appears that the Court after stating that the 14th Amendment standards do not apply, proceeds to apply exactly those standards. The court proceeds to discuss the matter under 14th Amendment standards and not something with less than "full force."

The Eighth Circuit in *Daly* v. *United States,* 483 F.2d 700 (8th Cir. 1973) has shed some light on the question of what standard applies holding that the one man, one vote rule applies to tribal elections. The Court citing *White Eagle* v. *One Feather,* 478 F.2d 1311 (8th Cir. 1973), stated: "In *One Feather* we held that where a tribe has adopted election procedures analogous to those found in Anglo-American culture, the equal protection clause of the Indian Civil Rights Act required that the election procedures comply with the one-man, one-vote principle established in *Baker* v. *Carr* (citation), and its progeny." pp. 704-705. The court then examined the election procedures of the

Crow Creek Tribe and held that since they were substantially Anglo-American in form, they should be controlled by Anglo-American standards. If the procedure is not in effect parallel to the Anglo-American system, then the standard would not be the same.

The court in *Daly, supra,* went on to uphold a blood quantum requirement involving the Crow Tribe. The Tribe required one-quarter blood or more, for enrollment as a tribal member, but required one-half blood or more for eligibility to be Chairman of the Council. This had been challenged as a denial of Equal Protection. The court stated:

> In the instant case, we also are convinced that the Tribe has sufficient cultural interest in setting a higher blood quantum requirement to hold office than for mere membership in the Tribe if it so desires. However, once the requirements are established, *they must be applied uniformly to avoid violating 25 U.S.C. § 1302(8),* pp. 705 & 706. (Emphasis added)

More recently in *Wounded Head* v. *Tribal Council of the Oglala Sioux Tribe,* 507 F.2d 1079 (8th Cir. 1975), the Court held that the "equal protection" clause of the Indian Civil Rights Act must be viewed in the context of tribal government and cultural background and was not the same as the "equal protection" clause of the Fourteenth Amendment. *See also, Means* v. *Wilson,* 522 F.2d 833 (8th Cir. 1925); *Howlett* v. *The Salish & Kootenai Tribes,* 529 F.2d 233 (9th Cir. 1976).

While no court had previously been called upon to answer this exact issue, there is authority as held by the trial court that a minimum requirement is that existing tribal law be applied with an even hand. App. page 24(a); *Daly, supra; Yellow Bird* v. *Oglala Sioux*

Tribe of South Dakota, 380 F.Supp. 438 (D.S.D. 1974). Uniform application of tribal laws is all that is required by the Civil Rights Act. It is undisputed that the Santa Clara enrollment rule was applied uniformly to all and that there has been no exception to the rule since it was codified in 1939. So long as there are no exceptions and identical rules and laws are applied to all members with either an even hand, or in a fair manner, then such action is within the safeguard intended and proper.

Though the proper test is that set out above, the enrollment rule of the Santa Clara Pueblo meets the stricter requirements of the Constitutional Equal Protection standard as the test has been construed in recent cases. The inquiry under this test is the legitimate state interest the classification promotes balanced against the fundamental personal right the classification might endanger. The Supreme Court has required that a statutory classification bear some rational relationship to a legitimate state purpose. *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972); *Morey* v. *Doud,* 354 U.S. 457 (1957); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966).

The Governor of Santa Clara Pueblo, when asked the probable effect of not enforcing the 1939 Ordinance testified that:

> It would tend to destroy the Pueblo as a whole. . . . Without it we would have an influx of people that we don't know who they are. They would come in from all directions; Indians and non-Indians alike. So it would be a destruction on the Santa Clara Indian culture. R. p. 117.

In response to a similar question, Dr. Florence Hawley Ellis, a retired Professor of Anthropology and a

leading expert on New Mexico Pueblo Indians (R.pp. 227-232) testified as follows:

> Well, because of the importance of men in connection with the carrying on of the culture, the training of the children in the socio-religious situation, *the culture eventually would break down and be lost.* R. p. 251 (emphasis added).

It is clear therefore that even under the stricter standard the Pueblo must prevail. In both the opinion of the expert witness and that of the Governor of the Pueblo, altering the present rule would be tantamount to destroying the very tribe the Martinez would be members of. This surely was not intended by Congress. The Martinez have made it clear they do not desire this result. App. page 25(a).

The recent Supreme Court decision in *Morton* v. *Mancari,* 417 U.S. 535 (1974), sheds further light on the special and unique legal status of Indian tribes. The lower court, a three judge district court, ruled that the "Indian Preference Act" was repealed, and included dicta indicating the Act was unconstitutional. The Supreme Court in reversing made the following observations:

> Resolution of the instant issue turns on the unique legal status of Indian Tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. . . . Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. p. 551.

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process. p. 555.

This case acknowledges the special legal status of Indians and Indian Tribes. Had the case involved non-Indians it seems fairly clear that the Act would have been held unconstitutional. However, the preference was "reasonable and rationally designed to further Indian self-government" . . . and thus sustained.

The Court of Appeals found that the enrollment rule is strictly the result of economics. This finding is inconsistent with the facts and simply answered by showing that the group of people in the class represented by Audrey Martinez has never been asked to leave the Pueblo, notwithstanding the fact that there are some one hundred people in that category, or almost ten percent of the entire population. Memo. Op. p. 3. Also of relevance is the fact that illegitimate children born to a Santa Clara tribal member woman are granted full rights and cared for by the Pueblo. R. p. 145.

The trial court was imminently correct in its holding that:

> the equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and therefore should be preserved and which of them are inimical to cultural survival and should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they

> must live with the decision every day. Obviously they can and should be the judges of whether a particular rule is beneficial or inimical to their survival as a distinct cultural group. App. p. 26(a).

The trial court after hearing evidence, observing the witnesses and being close to the facts and people involved concluded that:

> Much has been written about tribal sovereignty. If those words have any meaning at all, they must mean that a tribe can make and enforce its decisions without regard to whether an external authority considers those decisions wise. To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it. Congress has not indicated that they intended the Indian Civil Rights Act to be interpreted in such a manner. p. 26(a).

The decision in this case has a far reaching affect not only on Santa Clara Pueblo, but on all sovereign Indian Tribes in the United States. This decision may very well be the difference between survival or destruction of American Indian Tribes as they now exist, and is therefore a question that should be settled by the Supreme Court of the United States.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 10th Circuit in Martinez v. Santa Clara Pueblo No. 75-1615 (1976).

Respectfully submitted,

PRELO & GRODNER
Attorneys for Petitioners

By
MARC PRELO

November, 1976

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 9717 Civil

JULIA MARTINEZ, et al, *Plaintiffs*,

v.

SANTA CLARA PUEBLO, et al, *Defendants*.

(FILED JUNE 25, 1975)

Supplemental Memorandum Opinion on Jurisdiction

Plaintiffs, Julia Martinez and her daughter, Audrey Martinez, bring this suit, each individually and as the representative of a class, against the Santa Clara Pueblo and Governor Lucario Padilla, individually and in his capacity as governor of the Pueblo.[1] Plaintiffs seek a declaratory judgment that a portion of a tribal ordinance which denies Pueblo membership to the children of women (but not men) who marry non-members of the Pueblo violates 25 U.S.C. § 1302(8). This statute prohibits a tribal government in the exercise of its power of self-government from denying "to any person within its jurisdiction the equal protection of its laws or depriv(ing) any person of liberty or property without due process of law." Plaintiffs seek an injunction against the further enforcement of the ordinance.

The Ordinance of 1939 reads as follows:

> Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled,

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[1] At time of Trial, Paul Tafoya was the duly elected governor of the Pueblo and was sued individually and in his official capacity. Lucario Padilla was elected governor sometime after the case was tried, and has been substituted as a defendant, pursuant to F.R.C.P. 25(d).

that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

Plaintiffs attack subparts two and three of the ordinance only.

Jurisdiction was alleged to be conferred by 25 U.S.C. § 1302 (8) and 28 U.S.C. § 1343 (4). Defendants vigorously contest the question of jurisdiction. The following memorandum is filed at this time concerning the conclusion of law that jurisdiction over this action exists.

Plaintiff Julia Martinez is a female member of the Santa Clara Pueblo who is married to a non-member, Myles Martinez, a Navajo Indian. Plaintiff Audrey Martinez is one of eight surviving children of the marriage. Audrey and the other Martinez children have been denied membership in the Pueblo pursuant to the 1939 Ordinance because their father is not a member of the Pueblo. Defendant Santa Clara Pueblo is an Indian Tribe which was reorganized and adopted a constitution under the authority of 25 U.S.C. § 476. Defendant Lucario Padilla is the duly elected Governor of the Pueblo, charged by the law of Santa Clara

(Santa Clara Constitution, Article V; Santa Clara By-Laws, Article 1, Section 1) with enforcing the laws of the Pueblo, "civil and criminal, written and unwritten."

Prior to trial, defendants twice moved to dismiss this case for lack of subject matter jurisdiction. On the first motion to dismiss, defendants contended that federal courts lack jurisdiction over intertribal controversies, particularly those involving membership disputes, on the authority of *Martinez v. Southern Ute Tribe,* 249 F.2d 915 (10th Cir. 1957), cert. den. 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067, reh. den., 357 U.S. 924, 78 S.Ct. 1374, 2 L.Ed.2d 1376, and similar cases. The motion was denied at that time.

Martinez, supra, and its progeny decided before the enactment of the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq., held only that intra-tribal controversies, among them membership disputes, did not "arise under" the Constitution, laws or treaties of the United States, as they existed prior to the Indian Civil Rights Act, and that therefore 28 U.S.C. § 1331 did not confer subject matter jurisdiction on a federal district court to hear such a case. Since the enactment of the Indian Civil Rights Act, several courts have held that jurisdiction is conferred by virtue of the Act and 28 U.S.C. § 1331. *Dodge v. Nakai,* 298 F.Supp. 17, 25 (D. Ariz. 1968); *Loncassion v. Leekity,* 334 F.Supp. 370 (D. N.M. 1971); *Contra, Cornelius v. Moxon,* 301 F.Supp. 783 (D.N.D. 1969). See also *Colliflower v. Garland,* 342 F.2d 369 (9th Cir. 1965; *Settler v. Yakima Tribal Council,* 419 F.2d 486 (9th Cir. 1969), cert. den. 398 U.S. 903 (1970) (holding jurisdiction under 28 U.S.C. § 1331 on the basis of the law as it existed prior to the enactment of the Indian Civil Rights Act). Thus, *Martinez* and its progeny are not on point as to the jurisdictional question presented.

While the Tenth Circuit has not decided whether 25 U.S.C. § 1302(8) and 28 U.S.C. § 1343(4) confer jurisdiction over cases such as this, other courts which have considered this question have almost uniformly held in favor

of jurisdiction. *Crowe v. Eastern Band of Cherokee Indians,* 506 F.2d 1231 (4th Cir. 1974); *Laramie v. Nicholson,* 487 F.2d 315 (9th Cir. 1973) cert. den. 419 U.S. 871 (1974); *Johnson v. Lower Elwha Tribal Community,* 484 F.2d 200 (9th Cir. 1973); *White Eagle v. One Feather,* 478 F.2d 1311 (8th Cir. 1973); *Daly v. United States,* 483 F.2d 700 (8th Cir. 1973); *Brown v. United States,* 486 F.2d 658 (8th Cir. 1973); *Luxon v. Rosebud Sioux Tribe of South Dakota,* 455 F.2d 698 (8th Cir. 1972); *Seneca Constitutional Rights Organization v. George,* 348 F.Supp. 48 (W.D.N.Y. 1972); *Solomon v. La Rose,* 335 F.Supp. 715 (D.Neb. 1971); *Spotted Eagle v. Blackfeet Tribe,* 301 F.Supp. 85 (D.Mont. 1969). See also *Dodge v. Nakai,* supra, (where jurisdiction appears to have been upheld alternatively under 28 U.S.C. § 1331 or 28 U.S.C. § 1343(4) and 25 U.S.C. § 1302(8)). *Contra Yellow Bird v. Oglala Sioux Tribe,* 380 F.Supp. 438 (D.S.D. 1974); *Lefthand v. Crow Tribal Council,* 329 F. Supp. 728 (D.Mont. 1971). In addition, these cases, either by implication or expressly, have held that the Indian Civil Rights Act abrogates a tribe's sovereign immunity for purposes of suit under the Act. See also *Loncassion v. Leekity,* supra.

Several of these cases are closely on point. In *Laramie,* supra, plaintiffs were children alleging a membership ordinance was being applied in a discriminatory manner, in violation of the equal protection clause of the Indian Civil Rights Act. The Ninth Circuit upheld jurisdiction, almost without discussion, on the basis of its earlier decision in *Johnson v. Lower Elwha Tribal Community,* supra, noting that while *Johnson* involved the due process clause of 25 U.S.C. § 1306(8) in the context of revocation of a lease of tribal lands, "we see no difference in principle that distinguishes our *Johnson* case from this case." 487 F.2d 315, 316.

The case of *Yellow Bird v. Oglala Sioux Tribe,* supra, also involved an equal protection challenge to a tribal membership provision. In that case, however, the trial court granted defendants' motion to dismiss, holding that it lacked subject matter jurisdiction over the case. In Yellow Bird, plaintiffs sought to run in the Oglala primary election, apparently for positions as candidates for the tribal council. The Oglala Sioux Tribal election board refused to place their names on the ballot, apparently on the grounds that plaintiffs were barred from membership in the tribe by a tribal constitutional provision which restricted membership to those children born to a member of the tribe who was a resident of the reservation at the time of the birth of the child. The trial court based its decision on the language of the leading Eighth Circuit case on jurisdiction under the Indian Civil Rights Act, *Luxon v. Rosebud Sioux Tribe of South Dakota,* 455 F.2d 698 (8th Cir. 1972) that "[I]n our opinion, 28 U.S.C. § 1343(4) gives the district court jurisdiction to determine, in a proper case, whether an Indian Tribe has denied to one of its members any of the rights given to members under the Indian Bill of Rights." *Id.* at 700.

The court cast the question as one of interpretation of the Act to determine whether the equal protection guarantee of § 1302(8) of the Act extended to the situation presented, and after an examination of relevant Eighth Circuit decisions, held that it did not. The court concluded its opinion by noting that its decision was not in conflict with *Laramie,* supra, because *Laramie* involved discriminatory application of an ordinance, which plaintiffs in *Yellow Bird* had not alleged.[2]

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[2] The Court noted that there was no allegation that plaintiffs had ever applied to the Tribal Council to be enrolled as members, and commented: "The Tribal Council is the constitutionally proper body for determining membership qualifications." *Yellow Bird,* 380 F.Supp 438 at 440 (D.S.D. 1974). In the context of the opinion, this does not appear to have been decisive for the trial court and the case is discussed as though it is not. However, to the extent this fact raises the issues of justiciability or exhaustion, those issues will be discussed below.

The Court in *Yellow Bird* seems to give *Luxon* a more narrow interpretation than the case warrants. The plaintiff in *Luxon* was an enrolled member of the tribe who sought to run for election to the tribal council. The tribal constitution contained a provision barring members of the tribe who worked for the Public Health Service, as did plaintiff, from serving on the council. The District Court had dismissed the case on the grounds urged here—that it lacked jurisdiction to hear cases involving intratribal controversies. The Eighth Circuit reversed and remanded the case for determination of the merits, holding as quoted supra, jurisdiction existed under 28 U.S.C. 1343(4) and 25 U.S.C. 1302(8). The Court then stated:

> "While we determine that the district court has jurisdiction under 28 U.S.C. 1343(4) as set forth above, we express no opinion as to whether or not the facts alleged state a proper cause of action or whether, if true, the plaintiff is entitled to judgment on the merits. These determinations should first be made by the district court. As Mr. Justice Black noted in 1946:
>
> Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."

> *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946)
>
> *Luxon v. Rosebud Sioux Tribe of South Dakota*, 455 F.2d 698, 700 (8th Cir. 1972).

The decision in *Yellow Bird* virtually ignores this distinction.

The Tenth Circuit recently had occasion to comment on the distinction in *Junior Chamber of Commerce, Rochester, New York v. United States Jaycees, Tulsa, Oklahoma*, 495 F.2d 883 (10th Cir. 1974) cert. den., 419 U.S. 1026, 95 S.Ct. 505, 42 L.Ed.2d 301 (1974). In that case, the New York group and others had been excluded from affiliation with the defendant Oklahoma group because it allowed women members. The New York brought an action in federal district court under 42 U.S.C. 1983, alleging the action of defendants violated their rights under the Fifth and Fourteenth Amendments of the United States Constitution. The trial court granted defendant's motion to dismiss, not for lack of jurisdiction, but for failure to state a claim on the grounds that defendants had failed to show a substantial federal question. The basis for the trial court's decision was in essence that there was insufficient governmental involvement with the organization to subject it to the restrictions of the Fifth and Fourteenth Amendments. On appeal, the Tenth Circuit affirmed the trial court's action, on the basis of *Bell v. Hood*, supra, which it read as mandating dismissal for lack of jurisdiction only if the claim was so insubstantial as to be frivolous, or a mere matter of form, plead solely for the purpose of establishing jurisdiction.

The *Jaycee* case is decisive for the case at bar. The Indian Civil Rights Act is relatively new, and the law concerning its applicability and particularly the effect of the equal protection clause invoked by plaintiffs here is unclear. In view of this and the nature of the claims asserted,

they can hardly be characterized as frivolous or a mere matter of form. This court has jurisdiction to decide the case on the merits.

Defendants filed a second motion to dismiss, contending that the case should be dismissed for lack of jurisdiction in light of *McCurdy v. Steele,* 506 F.2d 653 (10th Cir. 1974). The motion was denied. My previous conclusion still stands.

Briefly, *McCurdy* was a declaratory judgment action concerning the validity of write-in votes under the Constitution of the Goshute Tribe. Plaintiffs, candidates in an election for the tribal council, contended that the votes were not valid, and, therefore, they had won the election. Faced with the questionable write-in votes, the Goshute Election Board had refused to certify any result of the election at all. Plaintiffs had attempted through administrative proceedings to gain recognition of their "election" from the Bureau of Indian Affairs; they were unsuccessful. Contemporaneously, the outgoing Council met and decided a new election should be held. Plaintiffs then filed suit in federal district court. There was, in *McCurdy,* no official tribal position on the question of the validity of write-in votes. Furthermore, as a result of the lawsuit, the second election was never held.

The *McCurdy* case can be viewed in two ways—either as holding that the case presented no justiciable controversy, or as holding tribal remedies and resolutions must be fully exhausted before a federal district court has jurisdiction of a case. Insofar as *McCurdy* is viewed as a justiciability decision, which in my opinion is the correct view in light of the language, the cases are distinguishable, for here there is a clearly expressed, institutionalized tribal position, i.e., the challenged ordinance.

Under the Santa Clara Constitution, the Council has been given both the Legislative and Judicial functions of the Pueblo. In addition, the Constitution, Article II, Section 1,

Subsection (c), specifically gives the Council the power to decide what children of "mixed" marriages shall be recognized as members of the Pueblo. The Council in 1939 chose to exercise that power and adopt the ordinance now under attack. Since then, every Council has chosen to enforce, rather than to amend or repeal that Ordinance. The policy of the Pueblo is clear, and the matter has been resolved by the Pueblo—against the plaintiffs.

The case at bar presents a clear "case or controversy" and there is no barrier to jurisdiction under the doctrine of justiciability.

Defendants argue that *McCurdy* holds that a federal district court will not assume jurisdiction unless plaintiff can show she has exhausted all remedies available to her within the tribe. While I do not agree with such a reading, it is certainly true that other courts have held that a plaintiff must exhaust administrative remedies within the tribe, *Clark v. Land and Forestry Committee of the Cheyenne River Sioux Tribe,* 380 F. Supp 201 (D.S.D. 1974), and have recognized the appropriateness of exhaustion of tribal judicial remedies in some circumstances. *White v. Tribal Council, Red Lake Band of Chippewa Indians,* 383 F.Supp. 810 (D.Minn. 1974) (exhaustion required); *Means v. Wilson,* 383 F.Supp. 378 (D.S.D. 1974) (exhaustion required); *Hickey v. Crow Creek Housing Authority,* 379 F.Supp. 1002 (D.S.D. 1974) (exhaustion required); *O'Neal v. Cheyenne River Sioux Tribe,* 482 F.2d 1140 (8th Cir. 1973) (exhaustion required); *Dodge v. Nakai,* 298 F.Supp. 17 (D.Ariz. 1968) (exhaustion not required in the specific instance). The exhaustion of tribal remedies is not a rigid prerequisite to jurisdiction, however, but is to be decided in the specific circumstances presented, taking into account the practical availability of tribal remedies, *Dodge v. Nakai,* supra, and the demands of tribal autonomy, as against the necessity of immediate action to prevent or redress the deprivation of rights guaranteed by the Indian Civil Rights

Act. *White v. Tribal Council, Red Lake Band of Chippewa Indians,* supra.

For the decision of this case, it will be assumed, without being decided, that exhaustion of remedies within the Pueblo would be required of these plaintiffs on the facts of this case. Even so, as a factual matter plaintiffs have exhausted all remedies reasonably, or even conceivably available to them.

A detailed summary of the efforts of Julia and Audrey Martinez would fill several pages. For the present, a summary of their activities is sufficient.

Julia Martinez first attempted to have Audrey recognized as a member of the Pueblo in 1946, shortly after Audrey was born.[3] Since 1963 her efforts have been vigorous and constant. Julia Martinez has met with her representative to the Council, to request that he present the request tha Audrey be enrolled to the council.[4] When her representative refused to bring the matter up in Council, she obtained special permission from the Governor to address the Council herself. She and other women in her situation have formed a committee which as a group petitioned representatives and, with special permission, the Council. Julia, individually and with the committee, succeeded in having a special meeting of the entire Pueblo convened to discuss the situation. Julia Martinez, individually and with the

[3] Defendants argued that these efforts were undertaken primarily by Julia Martinez, and that Audrey Martinez has never formally petitioned the Council to enroll her, although as she grew older she has participated in Julia's efforts, ignoring the custom and practice of the Pueblo, that a child should be presented for enrollment by her parent, rather than presenting herself.

[4] The By-Laws of the Tribe suggest that individual members of the pueblo may not directly petition the council, but must have their representative present matters to the council for them. Testimony makes it clear that this is and has been the custom of the tribe.

committee of similarly situated women attended meetings with various BIA officials, with the All-Pueblo Agency in Albuquerque. She and her husband Myles attempted to have Myles Martinez naturalized as a member of the Pueblo, in which case their children would have automatically been recognized as members. Mrs. Martinez also met with her State Representative concerning the recognition of her children as members of Santa Clara. Finally Mrs. Martinez attended the hearings held by the Subcommittee on Constitutional Rights of the United States Senate Committee on the Judiciary, where she sought the help of then Senator Sam Ervin, Jr. In most instances there has been more than one attempt to resolve the matter through a particular channel; in particular meetings with the Council representatives, the Governor and the Council have occurred four or five times over the last ten years. Finally, in 1971, Julia and Audrey Martinez sought legal advice. This suit was filed only after attempts by their lawyer to gain recognition for Audrey had failed. Plaintiffs have exhausted all available remedies within the Pueblo.

For the reasons given, I conclude that this Court has jurisdiction of this suit and must proceed to decide the case on its merits.

/s/ Edwin L. Mechem
United States District Judge

(Caption Omitted in Printing)

(Filed June 25, 1975)

Memorandum Opinion

Julia Martinez and her daughter Audrey Martinez bring this suit, each individually and as the representative of a class, against the Santa Clara Pueblo and Governor Lucario Padilla,[1] individually and in his capacity as governor of the Pueblo. plaintiffs claim that a portion of a tribal ordinance which denies Pueblo membership to the children of female but not male members of the Pueblo who marry non-members of the Pueblo, violates 25 U.S.C. § 1302(8), which prohibits a tribal government in the exercise of its powers of self-government from denying "to any persons within its jurisdiction the equal protection of its laws or depriv[ing] any person of liberty or property without due process of law." Plaintiffs seek an injunction against the further enforcement of the ordinance.

The ordinance, passed in 1939, reads as follows:

> Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:
>
> 1. All children born of marriage between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
> 2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.

[1] At the time of trial, Paul Tafoya was the duly elected governor of the Pueblo and was sued individually and in his official capacity. Some time after trial, Lucario Padilla was elected Governor and has been substituted as a defendant pursuant to F.R.C.P. 25(d).

> 3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
> 4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

Plaintiffs attack subparts two and three of the ordinance.

Julia Martinez is a female member of the Santa Clara Pueblo. She is and at all times pertinent to this action was married to Myles Martinez, a Navajo Indian who is not a member of the Pueblo. Plaintiff Audrey Martinez is one of the eight surviving children born to their marriage. Under the 1939 Ordinance, Audrey and the other Martinez children are not recognized as members of the Pueblo. By order previously entered, it has been determined that Audrey Martinez may properly bring this action as the representative of a class consisting of all children born to marriages between Santa Clara women and men who are not members of the Pueblo and that Julia Martinez may properly bring this action as the representatives of a class consisting of all women who are members of the Santa Clara Pueblo, and who have married men who are not members of the Santa Clara Pueblo.

Defendant Santa Clara Pueblo is an Indian tribe which has organized and adopted a constitution under the authority of 25 U.S.C. § 476. Defendant Lucario Padilla is the duly elected Governor of the Pueblo and is responsible for enforcing the laws of Santa Clara. Santa Clara Constitution, Article V; Santa Clara By-Laws, Article 1, Section 1.

Jurisdiction exists over this action under 25 U.S.C. § 1302(8) and 28 U.S.C. § 1343(4). The following memoran-

dum shall constitute the Findings of Fact and Conclusions of Law in this case.[1]

The social and political organization of the Pueblo must be discussed first. Santa Clara Pueblo was founded around 1300 A.D. The Pueblo now covers roughly 48,000 acres, held by the United States in trust for the Pueblo. Approximately 1,200 recognized members and between 150 and 200 non-members currently live on the Pueblo. Approximately 150 recognized members live elsewhere, one-third of them in other locations in New Mexico, and the rest scattered across twenty-two different states.

In its early days, Santa Clara culture made no distinction between what Anglo-Americans would term "political" and "religious" matters. However, with the Spanish invasion in the early seventeenth century, the Pueblo instituted a "secular" government to distract Spanish attention from the *caciques* (religious leaders) who were the real authorities in the Pueblo. The distinction between religious and secular spheres is now well established in the Santa Clara culture.

The membership of the Pueblo is and has been organized into what the anthropologists refer to as "moieties," specifically the Winter people and the Summer people. Each moiety is lead by a cacique, and each is further divided into factions. The precise function and significance of moiety membership is not clear on the record; it is, however, clear that it is primarily a religious grouping. The caciques are still the dominant authorities in the Pueblo, nominating the candidates for secular office and exercising an effective veto by influence over the actions of the secular government.

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[1] A discussion of the Conclusion of Law relating to the existence of jurisdiction is contained in an accompanying memorandum filed contemporaneously with this opinion and incorporated herein by reference.

The division of the moieties into factions is a relatively recent development. During the early part of the twentieth century sharp conflicts developed in the Pueblo over the importance of traditional customs and values in the life of the Pueblo. For example, a major source of controversy was whether the Governor should be an older, highly respected man who was well versed in the traditional ways, or a younger man, educated in Anglo-American schools, who could speak English and would be able to deal more effectively with non-Pueblo society. The disagreement literally split the Pueblo, and during the late 1920s and early 1930s the Pueblo had two governors, neither of whom recognized the authority of the other, and two separate Winter and Summer moieties. The Bureau of Indian Affairs (BIA) staff in Washington offered to arbitrate the dispute. The entire Pueblo agreed that the BIA officials from Washington were irrelevant.

They did agree to have the resident BIA agent, Elizabeth Sargent, help settle the difference. At her suggestion, and after much discussion, the Pueblo organized pursuant to the authority of the Wheeler-Howard Act, 25 U.S.C. § 476, and adopted a Constitution and By-Laws in 1935. As reorganized the secular government retained many of its traditional institutions, such as the unity of the legislative and "appellate" judicial functions in the Council, while at the same time incorporating and instituting certain Anglo-American institutions, principally voting for secular officials. Thus, the present Pueblo government is neither wholly traditional nor wholly anglicized.

Under the Constitution and By-Laws there is a single governing body, the Council, as noted, which possesses both legislative and "appellate" judicial powers. Santa Clara Constitution, Article IV, Sections 1 and 2. The Council consists of the secular officers of the Pueblo—the Governor, the Lieutenant Governor, the Secretary, the Treasurer, the Interpreter, and the Sheriff—and eight representatives.

Santa Clara Constitution, Article III, Sections 1 and 5. As a matter of custom and practice, the representatives represent the factions, which still exist.

The Governor is the chief executive of the Pueblo charged with enforcing the law "civil and criminal, written and unwritten." Santa Clara Constitution, Article V; Santa Clara By-Laws, Article 1, Section 1. In addition he appears to have the initial responsibility for settling controversies among and concerning the members of the Pueblo. A person aggrieved by a ruling of the Governor may appeal to the Council, *Id.*, at which time the Governor may vote only to break a tie. Santa Clara Constitution, Article IV, Section 2.

All other secular governmental power and responsibility is vested in the Council, including the power to enact ordinances governing Pueblo life, Santa Clara Constitution, Article IV, Section 1, Subsection 5. Most important for the present case, the Constitution specifically grants the Council the power to determine which children of mixed marriages shall be recognized as members of the Pueblo, Santa Clara Constitution, Article II, Section 2, and to determine who is a member for purposes of dealings in land and land use rights, Santa Clara Constitution, Article VII, Section 1. The 1939 Ordinance was enacted by the Council pursuant to these powers, and is agreed by all parties to be in force at this time.

The factual development of the equal protection claims of the parties is best begun by identifying the interests of plaintiffs and defendants affected or served by the Ordinance.

As previously noted, Audrey Martinez is the daughter of the marriage of plaintiff Julia Martinez, a recognized member of the Pueblo and Myles Martinez, a non-member of the Pueblo. It is undisputed that the 1939 Ordinance bars recognition of Audrey as a member of the Pueblo. If Myles were a member of the Pueblo and Julia Martinez were not

—or if Julia were not married, and Audrey had been born out of wedlock, the Ordinance would not bar her recognition as a member and the Council would in fact so recognize her.

Julia Martinez has lived at the Pueblo all her life, with the exception of a relatively brief absence to further her education. Myles Martinez has lived at the Pueblo ever since his marriage to Julia, with the exception of a relatively brief absence while serving in the armed forces. Audrey Martinez grew up on the Pueblo, although she does leave to pursue her education. Aside from the fact that she is not recognized as a member of the Pueblo and is therefore denied certain rights, she has been raised in the culture of Santa Clara, speaks Tewa, the traditional language, and clearly considers herself to be a Santa Claran.

As a factual matter, recognition as a member of the Pueblo would give Audrey Martinez three distinct types of rights which she is presently denied. First, she would gain political rights, primarily the right to vote, to take matters before the Pueblo Council, and the qualification to hold office as a secular official. Secondly, she would be entitled to share in the material benefits of Pueblo membership. The most important of the material benefits is that referred to as land use rights. As noted above, title to the Pueblo land is held by the United States in trust for the Pueblo, rather than for the individual members of the Pueblo. The Council may designate specific areas of the land to be set aside for the use of particular individuals, Santa Clara Constitution, Article VII, and members of the Pueblo are equally entitled to use land not specifically assigned to an individual. As a matter of custom and practice, these use rights are passed down through families. However, only members of the Pueblo are entitled to use rights; thus in families such as the Martinez family, where the children are not members of the Pueblo, the land use rights cannot be passed on to succeeding generations. In the

same manner, Article VII, Section 2 of the Santa Clara Constitution, provides that members may rent or sell their use rights, but again, only to other members. As noted above, the Council has the power under the Constitution to determine who is a member for purposes of land use rights. It is undisputed that since 1939 this determination has been governed by the 1939 Ordinance, although from the Constitution it would appear that the Council could, if it so decided, apply different criteria. Other material benefits and privileges include the right to hunt and fish on the land, the use of irrigation water, and an equal share in any distribution of pecuniary benefits made by the Pueblo, or any other programs, present or future, undertaken by the Pueblo for the benefit of its members.

Third, as members, Audrey and other children similarly situated would as of right be able to continue living at the Pueblo. While it is true that the Martinez family and a number of other families in their position live at the Pueblo, this is not as a matter of right. If and when Mrs. Martinez dies, the rest of the family, as non-members, would not have the right to continue living on the Pueblo, though it is not now known whether they would be forced to leave. Furthermore, under the Santa Clara Constitution, Article IV, Section 1, Subsection 5, non-members and only non-members may be expelled from the Pueblo for violating a Pueblo Ordinance.

Lack of membership does not now affect entitlement to federal benefits accorded Indians generally, or participation in the religious life of the Pueblo. In 1968, Mr. and Mrs. Martinez obtained BIA census numbers for their children, and since then the children have received all federal benefits generally available to Indians, including educational and medical benefits. As to religion, Audrey Martinez is already allowed to participate in Pueblo religious ceremonies to the same extent that she would be if she were a recognized member of the Pueblo. Thus, the question presented is one of membership in the Pueblo for purposes of purely internal, secular, rights and privileges.

Julia Martinez claims that the operation of the Ordinance rendering her children non-members denies her the equal protection of the laws and deprives her of property without due process of law. More specifically, she claims that the Ordinance necessarily restricts her land use rights and other material benefits and rights which she could give to her children if they were recognized as members.

In addition to these relatively precise and legally protectible interests, Julia and Audrey Martinez and many of those similarly situated share a strong emotional involvement with the Pueblo. Regardless of official definitions of membership, Julia Martinez feels that her children, having grown up in Santa Clara, should be recognized as Santa Clarans. Audrey Martinez, despite official definitions, clearly considers herself to be a Santa Clara Indian. While the law may not recognize or protect these interests, it would be foolish to pretend that they do not exist.

While the factual context of the legal claims made by Audrey and Julia Martinez differs, it is clear that both ultimately present the same legal question—whether the 1939 Ordinance violates their rights to equal protection of tribal laws, as secured to them by the Indian Civil Rights Act, 25 U.S.C. § 1302(8).

The specific interests of the Pueblo in membership policies generally and in the particular policy of the 1939 Ordinance are of concern as well. Since 1680 the Pueblo has existed as a conquered people, identifiable as a group but surrounded by an alien culture, first Spanish and later American. From a practical political standpoint, the result has been a tension in the life of the Pueblo between traditional Pueblo customs and values and the "modern" customs and values of Anglo-American society. As noted above, this tension was once so acute that the Pueblo be-

came divided against itself. The differences were eventually resolved by the adoption of the Constitution, which drew upon both traditional Pueblo and modern Anglo-American institutions, synthesizing them into a unique structure neither wholly traditional nor wholly modern.

The function of membership policies must be examined within this context. In *Dodge v. Nakai,* 298 F.Supp. 26 (D. Ariz. 1968), the Court dealt with the interest of the Navajo tribe in geographically defining itself, and controlling who could and could not enter the reservation. Membership policies present the same interests on a different level. They are no more or less than a mechanism of social, and to an extent psychological and cultural, self-definition. The importance of this to Santa Clara or to any other Indian tribe cannot be overstressed. In deciding who is and who is not a member, the Pueblo decides what it is that makes its members unique, what distinguishes a Santa Clara Indian from everyone else in the United States. If its ability to do this is limited or restricted by an external authority, then a new definition of what it is to be a Santa Claran is imposed, and the culture of Santa Clara is inevitably changed.

The second major interest served by membership policies, and by the particular policy of the 1939 Ordinance, is that of economic survival of the tribal unit. As plaintiffs have demonstrated, the adoption of the 1939 Ordinance was in response to a sudden increase in mixed marriages, which had resulted in a proportionate strain on the economic resources of the Pueblo. Plaintiffs argue that economic integrity of the Pueblo is less important than cultural autonomy. The difficulty with this position is that the two are not easily separable. The ability of the Pueblo to control the use and distribution of its resources enhances its ability to maintain its cultural autonomy.

Plaintiffs do not challenge the power of the Pueblo, as delegated to and exercised by the Council, to make and en-

force rules concerning membership. Their attack on the Ordinance is solely aimed at the criteria employed as to children of mixed marriages.

At trial the defendants sought to prove that the Ordinance was merely the written embodiment of ancient custom, or alternatively, that the Ordinance regulated membership for religious as well as secular purposes. The Ordinance does not regulate religious as well as political membership. As noted above, Audrey Martinez, although not a recognized member of the Pueblo, is allowed to participate in religious ceremonies to the same extent she would be if she were a member. While there is a relationship between religious life and secular, political life at Santa Clara, the distinction has been clear for nearly four hundred years. The Ordinance neither pertains to religious membership, nor necessarily affects it.

Whether or not the Ordinance is an embodiment of pre-existing ancient Pueblo custom is less clear. Before 1939 mixed marriages were relatively rare in the Pueblo, and consequently there was no need for a hard and fast rule concerning membership; rather, the Council considered each case separately. In that sense, the establishment of any rule must be seen as a break with tradition.

On the other hand, the criteria employed in classifying children of mixed marriage as members or non-members are rooted in certain traditional values. It appears that Santa Clara was traditionally patrilineal and patrilocal—in other words, that kinship, name and location of residence generally were expected to follow the male rather than the female line. These cultural expectations have lost much of their force, but they are not entirely vitiated. The absentee voter lists of the Pueblo show that in 1971, 148 members of the Pueblo lived elsewhere. Of these, 59 were men and 89 were women. In 1973, 143 members lived elsewhere, of whom 59 were men and 84 were women. Furthermore, it is

apparent that membership of the parents and marriage, either within or out of the Pueblo, has always been considered a highly significant factor in membership determinations as opposed to other possible criteria such as degree of Santa Clara ancestry. When a member of the Pueblo married a non-member, the status of children of the marriage was questionable. Consonant with this, children born to an unmarried Santa Clara woman have been and still are recognized as members, regardless of who the father is or might be.

It is clear that the interests of plaintiffs and defendants in the 1939 Ordinance are vitally important. Indeed, they are fundamentally the same. Both sides have political and property rights which are affected by the Ordinance. Both sides also have a deep psychological and cultural interest in the membership Ordinance which, if not legally quantifiable, cannot be ignored.

Basically ". . . Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their Territory, *Worcester v. Georgia*, 6 Pet. [31 U.S.] 515, 557, [8 L.Ed. 483] (1832); they are "a separate people" possessing "the power of regulating their internal and social relations . . ." *United States v. Kagama*, 118 U.S. 375, 381-382 [6 S.Ct. 1109, 30 L.Ed. 228] (1886); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 173 [93 S.Ct. 1257, 36 L.Ed. 2d 129] (1973)." *United States v. Mazurie*, —— U.S. ——, 95 S.Ct. 710, 42 L.Ed. 2d 706, 716, 717 (1975). This sovereign power, however, is subject to limitation by Congress; as a practical matter Indian tribes are sovereign only to the extent Congress has allowed them to remain so. *Worcester v. Georgia*, supra; *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959); *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971); *Seneca Constitutional Rights Or-*

ganization v. George, 348 F.Supp. 51 (W.D.N.Y. 1972); *United States v. Blackfeet Tribe of Blackfeet Indian Reservation*, 364 F.Supp. 192 (D.Mont. 1973); *Lohnes v. Cloud*, 366 F.Supp. 619 (D.N.D. 1973). In the specific instance of membership determinations, it is well settled that Congress may, and in some cases, has made membership determinations for purposes of distribution of tribal property under the control of the United States. *Martinez v. Southern Ute Tribe*, 249 F.2d 915, 920 (10th Cir. 1957) cert.den. 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067, reh. den. 357 U.S. 924, 78 S.Ct. 1374, 2 L.Ed.2d 1376; *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808 (E.D. Wash. S.D. 1965), aff'd 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480. It is equally well settled that, absent Congressional restrictions, an Indian tribe has the power to determine its own membership, at least for purely internal purposes. *Martinez v. Southern Ute Tribe*, supra. Thus, the question presented is to what extent Congress, by enacting 25 U.S.C. § 1302, commonly known as the Indian Civil Rights Act, has exercised its powers of control over membership determinations.

Courts faced with the necessity of contruing 25 U.S.C. § 1302(8) have consistently held that the equal protection guarantee of the Indian Civil Rights Act is not identical to the constitutional guarantee of equal protection. *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 (8th Cir. 1975); *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973); *Lohnes v. Cloud*, supra; *Groundhog v. Keeler*, supra. Instead, the Act and its equal protection guarantee must be read against the background of tribal sovereignty and interpreted within the context of tribal law and custom. *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231 (4th Cir. 1974); *Means v. Wilson*, 383 F.Supp. 378 (D.S.D. 1974). Unfortunately this principle does not answer questions so much as teach the terms in which they must be asked.

Few courts have been faced with the necessity of deciding specifically what the equal protection clause of the Indian Civil Rights Act means. Although sometimes couched in terms of jurisdictional analysis, it is clear that at a minimum, 25 U.S.C. § 1302(8) requires that existing tribal law be applied with an even hand, rather than being arbitrarily enforced in some cases and not in others, *Crowe v. Eastern Bank of Cherokee Indians, Inc.*, supra; *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, supra; *Laramie v. Nicholson*, 487 F.2d 315 (9th Cir. 1973), cert. den. 419 U.S. 871 (1974); *Yellow Bird v. Oglala Sioux Tribe*, 380 F.Supp. 438 (D.S.D. 1974) (dicta), and that certain aspects of procedural due process principally notice and a hearing, must be observed in granting or denying benefits, *Crowe v. Eastern Band of Cherokee Indians, Inc.*, supra; *Clark v. Land and Forestry Committee of the Cheyenne River Sioux Tribal Council*, 380 F.Supp. 201 (D.S.D. 1974); *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200 (9th Cir. 1973); see also *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973). In addition, it is well settled that blood quantum requirements for membership or office holding are valid classification under the Act, *Daly v. United States*, supra; *Simmons v. Eagle Seelatsee*, supra; despite their highly questionable validity under constitutional standards of equal protection.

On the other hand, there is authority to the effect that where a tribe has departed from traditional methods of choosing tribal officials and adopted Anglo-American voting procedures, the equal protection clause of the Act will incorporate the constitutional equal protection standard of *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), and, if necessary, courts will enforce that standard by ordering reapportionment of tribal voting districts. *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973); *Daly v. United States*, supra; *Brown v. United States*, 486 F.2d 658 (8th Cir. 1973); but see *White v. Tribal Council, Red Lake Band of Chippewa Indians*, 383 F.Supp. 810 (D.Minn. 1974). Even in this situation, however, the courts have viewed the matter of reapportionment as an aspect of equal enforcement of already existing tribal law, and have refused to interpret the equal protection clause of 25 U.S.C. § 1302(8) in a manner that would require the enfranchisement of a new class of the tribal population, *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1083 (8th Cir. 1975), on the grounds that such an action would come dangerously close to substituting Anglo-American culture for tribal culture.

In light of the legislative history of the Act, and the interpretations given it thus far, it is clear that 25 U.S.C. § 1302(8) should not be construed in a manner that would invalidate a tribal membership ordinance when the classification attacked is one based on criteria that have been traditionally employed by the tribe in considering membership questions. The 1939 Ordinance does not violate the restrictions of 25 U.S.C. § 1302(8), and plaintiffs have not been denied the equal protection of the laws within the meaning of the Indian Civil Rights Act.

Plaintiffs do not suggest that the Indian Civil Rights Act should be interpreted in a manner which would impose an Anglo-American equal protection standard on tribes in derogation of their traditional values. To the contrary, they have consistently argued, as have the defendants, that the Act should be interpreted in such a manner as to preserve the cultural identity of Indian tribes in general and of Santa Clara in particular. Plaintiffs instead point out that the sex of the parent who is a member of the Pueblo bears little or no relationship to the strength of the parent's identification with traditional Santa Clara culture or the likelihood that the parent will attempt to pass the traditional cultural values on to the child. They point out, quite correctly, that Audrey Martinez and many other children similarly situated have been brought up on the Pueblo,

speak the Tewa language, participate in its life, and are, culturally, for all practical purposes, Santa Clara Indians. On the other hand, there are certainly instances of children whose fathers are members of Santa Clara, but who have been raised far from the Pueblo, who cannot speak the language, who have not participated in the life of the Pueblo, and who know nothing of its values, customs and traditions, yet who are, under the 1939 Ordinance, recognized as members. Plaintiffs contend that this is not only irrational but actively destructive of the cultural identity of the Pueblo.

Even assuming plaintffs are correct, the equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and therefore should be preserved and which of them are inimical to cultural survival and should therefore be abrogated. Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day. Obviously they can and should be the judges of whether a particular rule is beneficial or inimical to their survival as a distinct cultural group.

Much has been written about tribal sovereignty. If those words have any meaning at all, they must mean that a tribe can make and enforce its decisions without regard to whether an external authority considers those decisions wise. To abrogate tribal decisions, particularly in the delicate area of membership, for whatever "good" reasons, is to destroy cultural identity under the guise of saving it. Congress has not indicated that they intended the Indian Civil Rights Act to be interpreted in such a manner.

Judgment will be entered in accordance with this opinion.

/s/ EDWIN L. MECHEM
United States District Judge

(Caption Omitted in Printing)

(FILED JUNE 25, 1975)

Judgment

This cause having come on for trial, and it having been determined that this cause is properly maintainable as a class action under Federal Rule of Civil Procedure 23(b)(2); that plaintiff Audrey Martinez may maintain this action for herself and as the named representative of the class of all children who are or will be born to marriages between women who are recognized members of the Santa Clara Pueblo and men who are not recognized members of Santa Clara Pueblo; that plaintiff Julia Martinez may maintain this action for herself and as the named representative of the class of all women who are recognized members of the Santa Clara Pueblo and who are married to or will in the future marry men who are not recognized members of Santa Clara Pueblo; and having made Findings of Fact and Conclusions of Law in this case in the form of a Memorandum Opinion and a Supplemental Memorandum Opinion Concerning Jurisdiction, finding the issues in favor of the defendants Santa Clara Pueblo and Governor Lucario Padilla, individually and in his capacity as Governor of the Pueblo, and against plaintiff Audrey Martinez, individually and as the representative of her class, and plaintiff Julia Martinez, individually and as the representative of her class; Now, Therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be, and the same hereby is, entered for the defendants Santa Clara Pueblo and Governor Lucario Padilla, individually and in his capacity as the Governor of the Santa Clara Pueblo, and against plaintiff Audrey Martinez, individually and as representative of her above-described class, and against plaintiff Julia Martinez, individually and as the representative of her above-described class, and that the plaintiffs' cause of action be, and the same hereby is, dismissed.

/s/ EDWIN L. MECHEM
United States District Judge

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 75-1615

JULIA MARTINEZ, on behalf of herself and all others similarly situated, and
AUDREY MARTINEZ, on behalf of herself and all others similarly situated,
Plaintiffs-Appellants,

v.

SANTA CLARA PUEBLO, and LUCARIO PADILLA, individually and as Governor of the Santa Clara Pueblo,
Defendants-Appellees.

ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., et al,
Amici Curiae.

Appeal from the United States District Court for the District of New Mexico
(D. C. No. 9717)

Richard B. Collins, Window Rock, Arizona (Alan R. Taradash and Tim Vollman, Window Rock, Arizona, on the brief), for Plaintiffs-Appellants.

Marc Prelo, Jr., Albuquerque, New Mexico (Richard J. Grodner, Albuquerque, New Mexico, on the brief), for Defendants-Appellees.

Arthur Lazarus, Jr., Washington, D.C., for Amici Curiae, Association on American Indian Affairs, Inc., and The Seneca Nation of Indians of New York.

Marvin J. Sonosky, and Of Counsel: W. Richard West, Jr. for Amicus Curiae, Shoshone Indian Tribe of the Wind River Reservation, Wyoming.

Philip R. Ashby, Albuquerque, New Mexico, and Of Counsel: Richard Schifter, Washington, D. C. for Amicus Curiae, Pueblo of Laguna.

Before BARRETT and DOYLE, *Circuit Judges*, and STANLEY,* *District Judge.*

DOYLE, *Circuit Judge.*

This case draws into question the validity of a membership ordinance of the Santa Clara Pueblo in New Mexico. The challenge is by appellants, on behalf of themselves and others similarly situated. This appellant class is composed of female members of the Pueblo, who are married to non-members, together with their children. Appellees, on the other hand, are the Pueblo and Lucario Padilla, individually and as governor of the Pueblo. The ordinance grants membership in the Pueblo to "[a]ll children born of marriages between male members of the Santa Clara Pueblo and non-members. . . ." It precludes membership for "[c]hildren born of marriages between female membes of the Santa Clara Pueblo and non-members. . . ." Appellants have alleged that the ordinance contravenes the equal protection and due process provisions of the Indian Civil Rights Act of 1968, 25 U.S.C. Section 1302(8).[1] In a trial to the court the decision was in favor of defendants. Martinez v. Santa Clara Pueblo, 405 F. Supp. 5 (D.N.M. 1975).

The subject membership ordinance was enacted on December 15, 1939, in response to a marked increase in marriages between Pueblo members and non-members. Prior to 1930 these had been rare. Prior to the enactment, mem-

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* Of the District of Kansas, sitting by designation.

[1] The statute provides, in pertinent part, that:

> No Indian tribe in exercising powers of self-government shall——
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; • • •.
>
> 25 U.S.C. Section 1302(8).

bership in the Pueblo for children of mixed marriages had been determined on an individual basis. In addition, witnesses for the Pueblo testified that there had been several instances, prior to 1939, in which the offspring of female line mixed marriages had been granted membership. The increase in mixed marriages produced concern about the enlarged demands for allocation of land and other tribal resources. The Pueblo's elders were apprehensive that the population increase resulting from intermarriage would strain the Pueblo's finite resources. It was, then, in response to the economic consequences of mixed marriages that the Pueblo Council determined that the offspring of female line mixed marriages would be denied membership while the offspring of male line mixed marriages would be admitted to membership.[2]

Appellant Julia Martinez, whose parents were Santa Clarans, is a member of the Pueblo. Her husband is a full-blooded Navajo and is not a member of the Pueblo. Their eight living children, including appellant Audrey Martinez, are as a result of the ordinance barred from membership in the Pueblo. The Martinezes have lived at the Pueblo con-

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[2] The ordinance is as follows:

Bet it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

Appellants are attacking sub-paragraphs 2 and 3 of the ordinance.

tinuously since their marriage in 1941. All of the Martinez children were reared at the Pueblo; all speak Tewa, the traditional and official language of the Pueblo; all are allowed to practice the traditional religion. In effect, the Martinez children are, culturally, members of the Pueblo.

Since 1946, Ms. Martinez has attempted to enroll her children in the Pueblo through all of the procedures available under the Pueblo government. When her resort to Pueblo remedies proved unavailing, she brought this action.

Appellants have alleged that the ordinance deprives the non-member children of various rights, including residence at the Pueblo as a matter of right; certain political rights, such as voting, holding secular office, bringing matters before the Pueblo council; sharing in the material benefits of Pueblo membership, such as using the land, hunting and fishing. Appellants also contended that the ordinance prevents Ms. Martinez from passing her possessory interest in land [3] on to her children.

The trial court ruled for the Tribe, holding that the ordinance did not violate the Indian Civil Rights Act. Judge Mechem recognized the Pueblo's interest in membership policies generally and in the 1939 ordinance specifically and noted that if the Pueblo's inability to define who is a Santa Claran is limited or restricted, the Pueblo's culture would be changed. He recognized also the legitimacy of the Pueblo's interest in its economic survival and that economic survival and cultural autonomy are interrelated, i.e., economics affects the Pueblo's ability to maintain its cultural

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[3] The Pueblo holds all of the land within the Pueblo's boundaries in fee simple title in common pursuant to an 1858 Act of Congress. 11 Stat. 374; New Mexico v. Aamodt, —— F.2d ——, Nos. 75-1069, 75-1106 (10th Cir. filed June 28, 1976), at 24. Individual members, however, are granted possessory interests in tracts of land which they may pass on to their descendants. The devolution of the possessory interests does not diminish the Pueblo's superior proprietary right.

autonomy and identity. While Judge Mechem found that the ordinance had no bearing on Pueblo religion, he did find that the male-female distinction was "rooted in certain traditional values," 402 F.Supp. at 16—the Pueblo's patrilineal and patrilocal traditions. In assessing the scope of the Indian Civil Rights Act, Judge Mechem found that the scope of the Act's equal protection provision was not coterminous with the constitutional guarantee of equal protection. ". . . [T]he Act and its equal protection guarantee must be read against the background of tribal sovereignty and interpreted within the context of tribal law and custom." *Id.* at 17. He concluded "that 25 U.S.C. Section 1302 (8) should not be construed in a manner that would invalidate a tribal membership ordinance when the classification attacked is one based on criteria that have been traditionally employed by the tribe in considering membership questions." *Id.* at 18, and that, thus, the ordinance did not deny appellants equal protection within the meaning of the Indian Civil Rights Act.

The issues to be considered on this appeal are: one, the sovereign immunity of the Pueblo and whether this court has jurisdiction to entertain the cause; and two, the legal standard applicable to claims of denial of equal protection under the Act. Third, we must decide whether the ordinance conflicts with the Civil Rights Act and, if so, whether the Act is to prevail or must give way to tribal authority.

I.

Whether the Court Has Jurisdiction To Entertain the Cause

The Tribe maintains that sovereign immunity precludes this suit. It also argues that the Indian Civil Rights Act does not furnish jurisdictional basis. We disagree. We have previously considered these arguments and have ruled that jurisdiction exists. Dry Creek Lodge, Inc. v. United States,

515 F.2d 926 (10th Cir. 1975). We also held that to the extent that the Indian Civil Rights Act applies, tribal immunity is thereby limited. Dry Creek Lodge, Inc. v. United States, *supra,* at 934, n.9. On the question of jurisdiction we said that 28 U.S.C. Section 1343(4) which provides for district court jurisdiction over actions brought under "any Act of Congress providing for the protection of civil rights" constituted an appropriate jurisdictional basis for actions under the Indian Civil Rights Act. Dry Creek Lodge, Inc. v. United States, *supra,* at 933, n.6, citing cases. Finally, since this Act of Congress was designed to provide protection against tribal authority, the intention of Congress to allow suits against the tribe was an essential aspect. Otherwise, it would constitute a mere unenforceable declaration of principles.

II.

The Meaning To Be Given to Equal Protection of the Laws as Provided in the Indian Civil Rights Act

A. *Legislative History.*

The Act of Congress in question which is found at 25 U.S.C. Section 1302 undertakes to single out the more important civil rights contained in the Constitution and to render those applicable to tribal members who reside on the reservation. The pertinent portion of the equal protection clause has been, as is apparent from n.1 above, selected as one of the specific protections adopted.[4]

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[4] The Act as it was finally passed, H.R. 2516, Title II (25 U.S.C. Section 1302), reads as follows:

Title I—Rights of Indians

Definitions

Sec. 101. For purposes of this title, the term——

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all

The question is whether Congress intended to make the above clause, as it affects the rights of Indian people in relationship to their tribal governnent, co-extensive with

governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, excluding courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

Indian Rights

Sec. 102. No Indian tribe in exercising powers of self-government shall——

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

the Federal Constitutional provision (Amendment XIV), which guarantees equal protection to all citizens including Indians. If full constitutional protection is not provided by the Act, to what extent does it furnish protection against discrimination which would under constitutional standards be held invidious and violative?[5]

The Indian Civil Rights Act of 1968 was the product of considerable study, most of which was conducted during 1961-63 by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee (1961-63 Hearings).[6] The authorizing Senate Resolution 53 was broad. It allowed the investigation to extend to "all matters pertaining to civil rights." 107 Cong.Rec. 997 (1961). The Subcommittee carried on a broad inquiry into Indians' constitutional rights in relation to tribal, State, and Federal authority.

The numerous abuses and denials of constitutional rights which were found to exist led to the introduction in 1965 of a series of bills designed to safeguard Indians' constitutional rights. *See* S.Rep. No. 841, 90th Cong., 1st Sess. (1967), pp. 5-6. The bill most pertinent to the case at bar was S.961 which provided that an Indian tribe in exercising its powers of local self-government was subject to the same limitations and restrictions as those which are imposed on the Governments, Federal and State, by the United States Constitution. The broad scope of the hearings is apparent

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

[5] We assume, for the moment, that the discrimination here in question is invidious.

[6] Hearings on Constitutional Rights of the American Indian Before the Subcom. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess., pt. 1 (1962), 87th Cong., 1st Sess., pt. 2 (1963), 87th Cong., 2d Sess., pt. 3 (1963), and 88th Cong., 1st Sess., pt. 4 (1964).

from the Committee's report.[7] As a result of the testimony taken, the original bill which generally imposed constitutional limitations on Indian tribes was amended so as to specify particular guarantees. *See* n.1, *supra*. This amended bill was reported to the full Senate in S.Rep. No. 841, 90th Cong., 1st Sess. (1967), and it passed unanimously, 113 Cong.Rec. 35471-77 (1967), as S.1843. After that the House of Representatives conducted hearings.[8] Senator Ervin, the bill's chief sponsor in the Senate, became impatient with the slowness of the House of Representatives. He amended S.1843 into the House civil rights bill (H.R. 2516), which was then pending in the Senate. 114 Cong.Rec. 5835-38 (1968). The bill, together with the Indian Civil Rights amendment, passed the Senate. 114 Cong.Rec. 5992 (1968). The House accepted the amendment, 114 Cong.Rec. 9621 (1968), and the measure became law as Title II of the Civil

[7] Hearings on Constitutional Rights of the American Indian, S. 961-68 & S.J. Res. 40, Before the Subcom. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. (1965).

Congressional concern was not limited to extending constitutional protections to Indians in their relations with tribal government. It considered a broad range of measures: S. 962, providing for federal court review of conviction by tribal courts where a constitutional deprivation is alleged; S. 963, authorizing investigation by the Attorney General of all claims of deprivation of constitutional rights by Indians; S. 964, directing the Secretary of the Interior to recommend to Congress a model code governing administration of criminal justice by courts of Indian offenses; S. 965, conferring concurrent jurisdiction on the United States with the States over offenses committed by non-Indians against non-Indians on Indian lands; S. 966, authorizing the States to assume civil and criminal jurisdiction over Indian territory with the consent of the Indians affected; S. 967, certain amendments to the Major Crimes Act; S. 968, expediting approval of certain tribal attorney contracts. The substance of these proposals, with two exceptions, were enacted into law. 114 Cong. Rec. 5835, 5992, 9621 (1968).

[8] Hearings on Rights of Members of Indian Tribes Before the Subcom. on Indian Affairs of the House Comm. on Interior & Insular Affairs, 90th Cong., 2d Sess. (1968).

Rights Act of 1968. The provisions extending these specific rights to Indians are codified at 25 U.S.C. Section 1302.

The congressional hearings gave little attention to constitutional rights other than protection under the criminal law and procedure of individuals in the tribal courts. Also, another area in which the Congress was particularly preoccupied was protecting generally the rights of individual Indians against infringement by tribal government. One proposal brought out in the 1965 hearings on S.961 would have made tribal governments fully subject to all constitutional restraints and requirements, but this was rejected due to the complexity of giving equality in voting rights which might conflict with tribal blood quantum requirements for membership and voting. Also, the First Amendment non-establishment clause, it was pointed out, would endanger the continued existence of Pueblo theocracies. 1965 Hearings 65, 221. But no such limitations were suggested with respect to equal protection which was frequently characterized as a basic or fundamental right among the guarantees. *E.g.*, 1965 Hearings 18, 61.

In response to criticism calling for enumeration of constitutional protections being extended to Indians, *e.g.*, 1965 Hearings 17, 65, 961, the Subcommittee amended the bill in order to delete the non-establishment clause and the Fifteenth Amendment as well as to specify the constitutional guarantees granted from the First and Fourth through Eighth Amendments plus the equal protection guarantee of the Fourteenth Amendment. S.1843; Indian Civil Rights Act of 1968, 25 U.S.C. Section 1302. This furnishes evidence that Congress actually considered the various rights contained in the Bill of Rights and retained those wihch it considered essential and eliminated those parts which it deemed to be out of harmony with Indian culture.

There were conflicting statements regarding refraining from undermining tribal authority. *E.g.*, 1961-63 Hearings

5, 287. But the Subcommittee members stated at the hearings, in Committee reports and in floor debates, their intent to extend broad constitutional protections to individual Indians. Senator Ervin stated that S.961 was intended to insure that individual Indians had the same rights against tribal authorities as other American citizens had under the Constitution. It was pointed out by others that off the reservation Indians had the same rights as other American citizens, but on the reservation their rights depended upon the benevolence of the tribal government. *E.g.*, 1961-63 Hearings, 3, 8, 286, 447; 1965 Hearings, 165, 221.[9] During the floor debate Senator Ervin said that the purpose of the bill was "to confer upon the American Indians the fundamental constitutional rights which belong by right to all Americans." 113 Cong.Rec. 35473 (1967).

The legislative history was not strictly limited to protection of individuals in tribal courts. There was attention given to the guarantee of the exercise of religious freedom. Instances were cited in which there had been deprivations of religious freedom and also there was evidence that actions in United States courts brought to vindicate these violations had failed on the ground that constitutional requirements were inapplicable to tribal governments.[10] This

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[9] The Committee report accompanying S. 1843, S. Rep. No. 841, stated that:

> One of the most serious inadequacies in tribal government arises from its failure to conform to traditional constitutional safeguards which apply to State and Federal Governments. As Senator Anderson, a member of the Committee on Interior and Insular Affairs has noted: "'An Indian citizen has all the rights of other citizens while he is off the reservation, but on the reservation, 'in the absence of federal legislation' he has only the rights given to him by the tribal governing body."

[10] The cases were Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D.N.M. 1954) (reprisals against Protestants by Pueblo) and Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (ban on peyote).

moved the Congress to retain the free exercise of religion among the protections extended to Indians, the adoption of which had the effect of overruling the decisions which had been rendered prior to the enactment of the Indian Bill of Rights. *See* n.10; 1965 Hearings 223; and *see* S.Rep. 841, pp. 7-11.

The legislative history is not free of evidence that Congress considered that in an evaluation such as the present one the cultural autonomy and integrity of the tribes were entitled to be weighed. Thus the deletion of the non-establishment clause and the Fifteenth Amendment appears to have been in deference to the traditional Indian culture. At the same time nothing resembling a formula for determining which of these conflicting interests is to prevail has been furnished.

It is significant that the Pueblos opposed the legislation in question. They regarded it as an effort to import into the tribal government the standards of United States constitutional law. The effect of this would, of course, be to undermine tribal law.

About the only way to resolve this conflict is to recognize the necessity to evaluate and weigh both of these interests. Thus the scope, extent and importance of the tribal interest is to be taken into account. The individual right to fair treatment under the law is likewise to be weighed against the tribal interest by considering the clearness of the guarantee together with the magnitude of the interest generally and as applied to the particular facts. *See* Note: The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv.L.Rev. 1343, 1355-60 (1969). The concern of Congress was to protect against serious deprivations of constitutional rights while giving as much effect as the facts would allow to tribal autonomy.

As a result of this comparative weighing, the question which we must answer is whether an ordinance such as

the present one which differentiates between the rights of men and the rights of women and which is clearly subject to subsection (8), the equal protection clause of the Indian Bill of Rights, can be upheld. A study of the legislative history, while it gives some some guides and suggestions, fails to provide a conclusive answer to the ultimate question presented in the case. The legislative proceedings do manifest a congressional intent to recognize the specific guarantee unless the tribal custom or principle outweighs the specific guarantee. In view of at least limited uncertainty, we proceed to a consideration of the positive decision law touching the subject.

B. *Consideration of the Precedents.*

The extent to which the equal protection clause of subsection (8) of the Indian Bill of Rights affords protection to affected persons such as the appellants is a novel question. While the decided cases have taken up and considered the equal protection clause in connection with related problems, no court has come to grips with the issue of discrimination by a tribe against Indian women. And so we ask the question whether a tribe may extend to men members fundamental rights while simultaneously denying the same rights to its women.

There are cases which say that Congress did not intend in enacting the Indian Civil Rights Act to subject a tribe to identical compulsions as those which are exacted under the equal protection clauses of the Fourteenth and Fifth Amendments to the Constitution of the United States.[11]

[11] *See* Howlett v. The Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971); *see also* Note, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv.L.Rev. 1343 (1969).

That is not the same as saying that men can be preferred over women in a substantial way.

One example in which the equal protection standard comes into play but in which the discrimination is less pronounced is in the cases dealing with the quantum of Indian blood as a criterion for tribal membership. Under the Constitution this type of case would constitute a violation. *See for example* Hirabayashi v. United States, 320 U.S. 81 (1943). Courts have, however, had little trouble in upholding these requirements when they have been challenged under the Indian Civil Rights Act. *See* Slattery v. Arapahoe Tribal Council 453 F.2d 278 (10th Cir. 1971), involving the requirement that tribal members possess one-quarter degree Indian blood. There was also the one-quarter requirement in Daly v. United States, 483 F.2d 700 (8th Cir. 1973). One-half degree was upheld for office-holding in the Crow Creek Sioux in the same decision.

The fact that the blood quantum requirement has been sustained furnishes little basis for upholding the discrimination in the case at bar because there is some semblance of basis for the classification. This is in terms of ancestral lines and in maintaining the integrity of the membership. Congress itself has employed these requirements in its definitions and other measures. *E.g.*, 25 U.S.C. Sections 1262, 1300e-1, 3 (1972 laws governing distribution of judgment funds to Indian tribes); Act of June 28, 1898, Section 21, 30 Stat. 495, 502-03 (enrollment criteria for Cherokee Indians).

We have examined the various other areas in which subsection (8) has been applied. Invariably the courts look to the Fourteen h Amendment to the Constitution as a guide. This is true in the election requirement cases both for voting and holding office,[12] in the apportionment of

[12] *E.g.*, Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975) (rejecting challenge based in part on purported application of 26th Amendment).

tribal legislatures,[13] residency requirements for voting and holding office,[14] and irregularities in the conduct of an election.[15]

The interest of the Tribe in maintaining its integrity and in retaining its tribal cultures is entitled due consderaton. *See* Means v. Wilson, 522 F.2d 833 (8th Cir. 1975). And where the tribal tradition is deep-seated and the individual injury is relatively insignificant, courts should be and have been reluctant to order the tribal authority to give way. *See* Howlett v. The Salish and Kootenai Tribes, 529 F.2d 333 (9th Cir. 1976).

It is conceded that if the validity of the instant ordinance were to be measured by the Fourteenth Amendment alone, it would have to held violative because it draws its classification lines solely on the basis of sex. The offspring of a mixed marriage in which the woman is a Santa Claran are, by the terms of the ordinance, disqualified from membership in the Pueblo. Where, however, the man is a member of the Santa Clara Pueblo, the offispring of this mixed marriage suffer no such disability. An enactment which works this kind of discrimination violates the equal protection clause of the United States Constitution. Frontiero v. Richardson, 411 U.S. 677 (1973). *See also* Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971).

The Fourteenth Amendment standards do not, however, apply with full force. They do, nevertheless, serve as a

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[13] *E.g.*, Daly v. United States, 483 F.2d 700 (8th Cir. 1973); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973) (requiring reapportionment).

[14] *E.g.*, Howlett v. The Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); Two Hawk v. Rosebud Sioux Tribe, 404 F. Supp. 1327 (D.S.D. 1975) (upholding residency requirements).

[15] *E.g.*, Means v. Wilson, 522 F.2d 833 (8th Cir. 1975) (setting aside election).

persuasive guide to the decision. The history and decisions teach us that the Indian Bill of Rights is modeled after the Constitution of the United States and is to be interpreted in the light of constitutional law decisions.

But we must still ask: is the Tribe justified in deviating from the Fourteenth Amendment standard on the basis that tribal, cultural and ethnic survival would suffer from full-scale enforcement of subsection (8) to these facts? We must hold that the facts do not support a decision that the Tribe's interest is compelling. The children of Julia and Myles Martinez are 100 percent Indian and 50 percent Santa Claran. They speak the language of the Santa Clara Pueblo, namely, Tewa. They practice the customs of the Tribe and are accepted into the Tribe's religion; nevertheless, they are denied membership and face exclusion with attendant loss of rights of inheritance, residency and voting, together with ability to pass tribal membership to their offspring, solely because their mother rather than their father is a Santa Claran. Compare this with the rights that are accorded the male member of the Santa Clara Pueblo. Even if he marries outside the Pueblo one who is not an Indian, and even though his family resides outside the territory of the Tribe, the offspring are entitled to tribal membership. The Tribe has not shown how such an incongruous and unreasonable result fosters and promotes cultural survival.

The contention is that the culture is patrilineal, patrilocal or patricultural. These, however, are conclusory characterizations. What is the history? The ordinance was passed in 1939 to deal with an unprecedented phenomenon, namely, mixed marriages on a relatively wide scale which resulted from Indians of different tribes meeting and encountering one another in Indian schools. An added element was Indians becoming acquainted while employed off the reservation. They met not only Indians from other tribes, but Anglos as well. Traditionally the Santa Clara female

moved to the house of the Santa Clara husband and undoubtedly the Santa Clara male played a large role in educating the children in the Pueblo's traditions. This is the strongest argument in favor of the Tribe, but it falls short of justifying sex discrimination since there could have been a solution without discrimination. It is important to note also that prior to the adopton of this ordinance the mixed marriage problem was dealt with on an individual case basis. The evidence shows that under this policy there were situations in which the offspring of a Santa Clara woman were admitted to the Pueblo and so historically the 1939 ordinance cannot be said to represent the Santa Clara tradition.

There is evidence that the ordinance was the product of economics and pragmatics. It appeared to the governing body of the Tribe that the offspring of mixed marriages threatened to swell the population of the Pueblo and diminished individual shares of the property. If this were the pressing problem it could have been solved without resorting to discrimination—by simply excluding the offspring of both sexes where the parent, either male or female, married outside the Pueblo.

We do not deny that the power to control and define tribal membership is important in preserving the Tribe's culture and ethnic identity. 402 F. Supp. at 15. Also of great importance is the interest of the individual Indian in tribal membership. His interest extends to living in a particular cultural setting in close relationship with fellow members, inheriting tribal rights, and enjoying federal and other incidental benefits. *See* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974). If the equal protection clause of the ICRA is to have any consequence, it must operate to ban invidious discrimination of the kind present in this case.

The effect of the ordinance under attack is not to exclude cultural outsiders from the Santa Clara Pueblo. The Mar-

tinez children and many others of the class "have been brought up on the Pueblo, speak the Tewa language, participate in its life, and are for all practical purposes, Santa Clara Indians." 402 F. Supp. at 18. They are persons within the cultural group who have been allowed to develop a substantial stake in the life of the Tribe.

The express term and conditions of subsection (8) purport to guarantee equal justice. Congress could have couched this provision in different terms if it had not intended to enact an effective provision. It did not do so. It is not for us to say that the meaning is unclear or that some other effect was intended. We must conclude that subsection (8) means what it says and that the ordinance is out of harmony with it. The instant tribe policy is of relatively recent origin and so it does not merit the force that would be attributable to a venerable tradition. Also, inasmuch as it originates from practical economic considerations, it becomes an arbitrary and expedient solution to the problem which was then confronting the Tribe. In sum, if we were to approve their ordinance and in turn approve this plain discrimination, it would be tantamount to saying that the Indian Bill of Rights is merely an abstract statement of principle.

The judgment of the district court is reversed and the cause is remanded for further proceedings.

Supreme Court, U. S.
FILED
APR 26 1977
MICHAEL RODAK, JR., CLERK

No. 76-682

In the Supreme Court of the United States

OCTOBER TERM, 1976

SANTA CLARA PUEBLO, ET AL., PETITIONERS

v.

JULIA MARTINEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.,
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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of January 25, 1977, inviting the Solicitor General to express the views of the United States.

QUESTIONS PRESENTED

1. Whether the federal courts have jurisdiction under 28 U.S.C. 1343(4) over suits alleging violations of the Indian Civil Rights Act (25 U.S.C. 1301-1303).

2. Whether Congress, in enacting the Indian Civil Rights Act, waived the immunity from suit of Indian tribes.

3. Whether an ordinance of the Santa Clara Pueblo that denies membership in the Tribe to children of women who marry outside the Tribe but not to children of men

who marry outside the Tribe violates the equal protection clause of the Indian Civil Rights Act (25 U.S.C. 1302(8)).

STATEMENT

Respondents, a female member of the Santa Clara Pueblo Indian Tribe and her non-member daughter, brought this class action for declaratory and injunctive relief in the United States District Court for the District of New Mexico. The complaint named as defendants the Santa Clara Pueblo and the Governor of the Pueblo individually and in his official capacity (Pet. App. 1a). Respondents alleged in the complaint that a Pueblo ordinance that denies membership to the children of women, but not men, who marry outside the Pueblo discriminated against them on account of sex.

In a separate opinion on jurisdiction, the district court held that the Indian Civil Rights Act and 28 U.S.C. 1343(4) conferred jurisdiction over this cause of action and that the claim against the Pueblo was not barred by sovereign immunity (Pet. App. 3a-11a). Turning to the merits, the court then held that the ordinance did not violate 25 U.S.C. 1302(8), which prohibits an Indian tribe from denying any person equal protection of its laws or depriving any person of liberty or property without due process of law. The court reasoned that "25 U.S.C. §1302(8) should not be construed in a manner that would invalidate a tribal membership ordinance when the classification attacked is one based on criteria that have been traditionally employed by the tribe in considering membership questions" (Pet. App. 25a).

The court of appeals reversed. Agreeing with the district court that it had jurisdiction over the claim and that sovereign immunity did not bar relief, the court of appeals labelled the ordinance "plain discrimination"

and condemned it as "an arbitrary and expedient solution" to an economic problem facing the Pueblo when it passed the ordinance in 1939 (*id.* at 45a). The court stated that "subsection (8) means what it says and * * * the ordinance is out of harmony with it" (*ibid.*).

DISCUSSION

This case presents important questions regarding the interpretation and effect of the Indian Civil Rights Act. Although the federal courts of appeals have generally agreed that the Indian Civil Rights Act, coupled with the provisions of 28 U.S.C. 1343(4), confers jurisdiction on the federal courts to review tribal actions allegedly in conflict with the Act, that issue is sufficiently important to merit final resolution by this Court. Moreover, the standard by which tribal actions are to be measured against the Act's equal protection clause is a troublesome and significant issue that warrants the Court's attention. It is therefore the position of the United States that the Court should grant the petition for a writ of certiorari in this case.

1. Although Indian tribes have many attributes of sovereign nations, the Bill of Rights does not regulate their actions with regard to their members. *Talton* v. *Mayes*, 163 U.S. 376; *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131 (C.A. 10); see also *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (C.A. 8). But see *Colliflower* v. *Garland*, 342 F. 2d 369 (C.A. 9). In response to a perceived lack of constitutional safeguards for individual Indians vis-a-vis their tribes, Congress in 1968 enacted the Indian Civil Rights Act (Pub. L. 90-284, 82 Stat. 73, 77, Title II of the Civil Rights Act of 1968; now codified as 25 U.S.C. 1301-1303). The Act enumerates certain

specific rights, with particular emphasis on criminal procedure, that tribal governments may not abridge. The controversy in this case arises under Section 1302(8) of the Act, which provides:

> No Indian tribe in exercising powers of self-government shall * * * deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law [25 U.S.C. 1302(8)].

The Act contains no specific provision giving federal courts general jurisdiction over suits alleging violations of the Act.[1] The courts thus have been left the duty of interpreting the Act to make it effective, while at the same time protecting Indian self-government.[2] In this case the court of appeals ruled (Pet. App. 32a-33a), as have the other federal courts of appeals faced with the question,[3] that the federal courts have jurisdiction over causes of action arising under the Act by virtue of 28 U.S.C. 1343(4), which grants to federal district courts jurisdiction over cases commenced by any person "[t]o recover damages or to secure equitable or other

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[1]The only jurisdictional provision in the Act, 25 U.S.C. 1303, provides:

> The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

[2]Both of these objectives are within the congressional intent. See Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harvard Journal on Legislation 557 (1972).

[3]See, *e.g.*, *Crowe* v. *Eastern Band of Cherokee Indians, Inc.*, 506 F. 2d 1231, 1234 (C.A. 4); *Brown* v. *United States*, 486 F. 2d 658, 661 (C.A. 8); *Howlett* v. *The Salish and Kootenai Tribes*, 529 F. 2d 233, 236 (C.A. 9).

relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

We believe the question whether Section 1343(4) provides a proper jurisdictional base to protect the rights, in addition to those redressable by writ of *habeas corpus*, secured by the Indian Bill of Rights, cf. *Securities Investor Protection* v. *Barbour*, 421 U.S. 412; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409; *J. I. Case Co.* v. *Borak*, 377 U.S. 426, is a substantial jurisdictional question that should be resolved by this Court. That question not only is significant in itself but also is closely related to the question of sovereign immunity discussed in the following section.

2. The United States Constitution treats Indian tribes *in pari materiae* with States and foreign nations. Art. I, Sec. 8, cl. 3. This Court, while recognizing Congress' plenary authority over Indian tribes and trust responsibility towards them, has also recognized their residual sovereignty as governmental entities—a sovereignty predating the Constitution. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164; *Worcester* v. *Georgia*, 6 Pet. 515. An Indian tribe is therefore immune from suit unless that immunity is waived. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512. A waiver of the immunity of an Indian tribe must be in "plain and unambiguous terms." *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372, 376 (C.A. 8). Cf. *United States* v. *Testan*, 424 U.S. 392; *Edelman* v. *Jordan*, 415 U.S. 651.

Despite the absence of any stated congressional intent to alter historical practice, the court of appeals below held that the Indian Civil Rights Act implicitly abrogated the Indian tribes' traditional immunity from suit. Although this conclusion accords with the views of the other courts of appeals

that have considered the question (see, *e.g.*, *Crowe* v. *Eastern Band of Cherokee Indians, Inc.*, 506 F. 2d 1231, 1233-1234 (C.A. 4); *Means* v. *Wilson*, 522 F. 2d 833, 841 (C.A. 8); *Howlett* v. *The Salish and Kootenai Tribes*, 529 F. 2d at 233, 236 (C.A. 9)), we note that continued recognition of tribal sovereign immunity would not necessarily deprive the Act of any effect; the provisions of the Act would have full force in *habeas corpus* cases, 25 U.S.C. 1303, and presumably could be raised in defense to any actions initiated by the Tribe. Because the protection of sovereign immunity is of obvious importance to all tribal governments, and should not lightly be dispensed with on the basis of inferences of legislative intent, we believe this Court should give the matter plenary review.[4]

3. Although the issue was not addressed by either court below, we note that respondents named not only the Pueblo itself but also the Governor of the Pueblo as a defendant.[5] Should this Court determine that the Pueblo is shielded from suit under the Indian Civil Rights Act by the doctrine of sovereign immunity, the Court may also consider the related question whether the Act authorizes suits for declaratory and injunctive relief against tribal officers acting in their official capacities. Cf. *Ex Parte Young*, 209 U.S. 123.[6]

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[4]Respondents did not seek damages against the Tribe. Resolution of the question whether tribes are immune from suits under the Act for declaratory and injunctive relief, however, may have a significant bearing on the question whether they are immune from suits for damages as well.

[5]By Santa Claran law, the Governor is charged with enforcing the laws of the Pueblo. Pet. App. 2a-3a, 13a.

[6]Since respondents sought only injunctive and declaratory relief, the question whether tribal officers are liable for damages under the Act, cf. *Wood* v. *Strickland*, 420 U.S. 308; *Scheuer* v. *Rhodes*, 416 U.S. 232, is not presented here.

4. The Court should also grant review to consider the proper standard to be applied in cases arising under the equal protection clause of the Indian Civil Rights Act, 25 U.S.C. 1302(8).

In holding that the 1939 Pueblo ordinance violated the equal protection clause of the Act, the court of appeals did not advance a clear standard for weighing respondents' interests against those of the Pueblo. On the one hand, the court stated that "[t]he Fourteenth Amendment standards do not * * * apply with full force" (Pet. App. 42a); on the other hand, the court held that "the facts do not support a decision that the Tribe's interest is compelling" (*id.* at 43a).[7] The court of appeals also suggested application of a "less restrictive alternative" test, rejecting the Tribe's "strongest argument" (the importance of education by a Santa Claran male in Pueblo traditions) because "there could have been a solution without discrimination" (Pet. App. 44a).

This uncertainty regarding the proper standard to be applied under the equal protection clause of the Indian Civil Rights Act is not confined to the Tenth Circuit. Although the federal courts of appeals have generally agreed that the necessity for preserving tribal culture and self-government justifies applying the equal protection clause of the Indian Civil Rights Act differently from that of the Fourteenth Amendment, they have not agreed on a workable test. (See, *e.g.*, *White Eagle* v. *One Feather*, 478 F. 2d 1311, 1314 (C.A. 8); *Howlett* v. *The Salish & Kootenai Tribes*, *supra*, 529 F. 2d at 238). For example, the Eighth Circuit, in *Means* v. *Wilson*, *supra*, 522 F. 2d at 842, framed the pertinent inquiry

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[7]The court also distinguished cases involving quantum-of-blood requirements for membership because "there is some semblance of basis for the classification" in those cases (Pet. App. 41a). See *Slattery* v. *Arapahoe Tribal Council*, 453 F. 2d 278 (C.A. 10).

as whether the challenged action was "founded in tribal custom or governmental purpose which would justify modification of traditional equal protection concepts," while the Ninth Circuit, in *Howlett* v. *The Salish and Kootenai Tribes, supra*, 529 F. 2d at 238, placed emphasis on whether "strict application of traditional equal protection doctrines would significantly impair a tribal practice or alter a custom firmly embedded in Indian culture." In other circumstances, however, federal courts of appeals have undertaken a less intensive examination of the basis and need for the tribal law, apparently requiring little more than that it be applied equally to persons similarly situated. See, *e.g.*, *Crowe* v. *Eastern Band of Cherokee Indians, supra.*

This case demonstrates the importance of a comprehensible and workable equal protection test under the Indian Civil Rights Act. The court of appeals correctly recognized that respondents had an important interest in tribal membership: "The children of Julia and Myles Martinez are 100 percent Indian and 50 percent Santa Claran. They speak the language of the Santa Clara Pueblo, namely, Tewa. They practice the customs of the Tribe and are accepted into the Tribe's religion; nevertheless, they are denied membership and face exclusion with attendant loss of rights of inheritance, residency and voting, together with ability to pass tribal membership to their offspring, solely because their mother rather than their father is a Santa Claran" (Pet. App. 43a). On the other hand, petitioners contend that such discrimination is defensible in the context of its traditionally patrilineal and patrilocal society (see Pet. App. 21a).[8] Moreover, the power to determine membership

[8]We note that non-Indian culture has only recently begun to accord women equal treatment under the law. It may therefore be necessary to determine whether social and legal changes in non-Indian society, which in turn may provoke a change in standards to be applied under the equal protection clause of the Fourteenth Amendment (compare *Hoyt* v. *Florida*, 368 U.S. 57, with *Craig* v. *Boren*, 429 U.S. 190), must be incorporated into Indian society through application of the equal protection clause of the Indian Civil Rights Act or, at least, whether the changed equal protection standards shall apply with full force.

has long been a vital part of Indian tribal sovereignty. "The courts have consistently recognized that in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership." Cohen, *Handbook of Federal Indian Law*, 133 (1941).[9]

5. In our view, therefore, the issues presented by this case are difficult ones with far-reaching implications for both tribal governments and tribal members.[10] Tribes and their members need to know with greater certainty the kinds of relief that federal courts can grant under the Indian Civil Rights Act and the kinds of tribal actions that are proscribed by the Act's equal protection clause. Should the Court grant certiorari, the United States will file an *amicus curiae* brief addressing these questions on the merits.

[9]Records of the Bureau of Indian Affairs indicate that at least thirteen other Indian tribes have membership provisions based upon the father's or mother's blood line.

[10]We addressed similar issues in our *amicus* memorandum responding to the petition for a writ of certiorari in *Tonasket* v. *Thompson*, certiorari denied, 419 U.S. 871.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1977.

DOJ-1977-04

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO, *et al.*,

Petitioners,

v.

JULIA MARTINEZ, *et al.*,

Respondents.

MOTION OF THE SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER INDIAN RESERVATION, AND THE NATIONAL CONGRESS OF AMERICAN INDIANS FOR LEAVE TO FILE BRIEF *AMICI CURIAE* and BRIEF *AMICI CURIAE*

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IN THE

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JULIA MARTINEZ, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The Shoshone Indian Tribe and the Arapahoe Indian Tribe, both of the Wind River Indian Reservation, Wyoming, and the National Congress of American Indians (NCAI) move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. The petitioner Santa Clara Pueblo has consented to the filing of this brief. The respondents have refused to consent.

The Tribes and NCAI file this motion because of the far-reaching impact of the decision below on the enrollment ordinances of almost every Indian tribe. The Court

is respectfully referred to the statement of the interest of *amici* appearing in the accompanying brief.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO, *et al.*,
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Respondents.

INTEREST OF *AMICI*

The Shoshone Indian Tribe and the Arapahoe Indian Tribe are American Indian tribes with governing bodies recognized by the United States. The Tribes reside on the Wind River Indian Reservation, Wyoming. The Shoshone Tribe has 2216 members and the Arapahoe Tribe has 3111 members. Enrollment and inheritance practices in the Arapahoe Indian Tribe and the Shoshone Indian Tribe are unilineal but primarily follow the male line.

The National Congress of American Indians, Inc., (NCAI), is the oldest and most representative national organization devoted to the promotion, protection and preservation of the interests of American Indians. NCAI's

current membership includes most Indian tribes in the country and over 1500 individual members. Thus constituted, NCAI advocates positions supporting both tribal government and individual Indian people.

Membership in an Indian tribe is the equivalent of citizenship. For a tribe to ensure its existence as an Indian tribe, it must have the power to set standards for membership. Until the decision below, the exercise of this power was left to the tribes. Over the years, as circumstances and times have changed, tribes, of their own accord and by democratic process, from time to time have made changes in the requirements for enrollment. The decision below, however, would impose the external standards of the non-Indian society for the enrollment criteria of the tribes. The interest of *amici* is that enrollment in the tribes should be a decision for the tribes, not for the federal courts.

REASONS FOR GRANTING THE WRIT

1. **The case presents an issue of great importance to all Indian Tribes.** If the decision below stands, not only the Shoshone Indian Tribe and the Arapahoe Indian Tribe but all Indian tribes will be seriously affected. Membership in an Indian tribe represents the equivalent of citizenship. The right of a tribe to define its standards for citizenship is an indispensable prerequisite to self-preservation and integrity as a uniquely identifiable Indian nation. Indeed, no attribute of tribal sovereignty is more fundamental than the right of an Indian tribe to determine who its members shall be. See Cohen, Felix S., *Handbook of Federal Indian Law*, pp. 133-137 (GPO 1942).

Prior to the Indian Civil Rights Act of 1968, the law was settled that tribes have complete authority, as

political entities with attributes of sovereignty, to determine all questions of their own membership. E.g., *Cherokee Intermarriage Cases*, 203 U.S. 76, 95 (1906); *Roff v. Burney*, 168 U.S. 218 (1897); *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (C.A. 10, 1957), certiorari denied 356 U.S. 560 (1958). Where the question has arisen since the Indian Civil Rights Act, the courts have declined to interfere with tribal enrollment standards. *Baciarelli v. Morton*, 481 F.2d 610 (C.A. 9, 1973); *Slattery v. Arapahoe Tribal Council*, 453 F.2d 278 (C.A. 10, 1971). The case below is the only decision since the Indian Civil Rights ACt where a court has chosen to interfere with the ceiteria for tribal membership.

2. **The decision below creates uncertainty as to the applicable law and possible conflict among the circuits.** Thousands of tribal membership determinations are made each year. The decision below opens an avenue of federal litigation where tribes and their members will be exposed to uncertainty as to the validity of previously unchallenged tribal rolls. Tribal governing bodies will find themselves insecure in anticipating the standards that federal courts may find acceptable.

The Eighth and Ninth Circuits have evolved a suitable test for determining when tribal action would be reviewable under the equal protection clause of the Indian Civil Rights Act. Essentially, these courts have sustained tribal actions that deviate from the Anglo-American equal protection standard, if such actions are justified in terms of the tribes' interest in maintaining a separate and unique political and Indian society. *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233 (C.A. 9, 1976) (residency requirement for election to tribal office sustained); *Daly v. United States*, 483 F.2d 700, 705-06 (C.A. 8, 1973) (blood quantum requirements for tribal officeholders

upheld); *Woulded Head v. Oglala Sioux Tribal Council*, 507 F.2d 1079, 1083 (C.A. 9, 1975). *Cf. White Eagle v. One Feather*, 478 F.2d 1311, 1314 (C.A. 8, 1973) ("one-man, one-vote" principle applied to tribal election district apportionment).

The court below tested the Pueblo's membership ordinance by a different standard. It concluded the ordinance violated the Indian Civil Rights Act "because it draws its classification lines solely on the basis of sex" and "the facts do not support a decision that the tribe's interest is *compelling*." 540 F.2d at 1046, 1047 (emphasis added).

The "compelling interest" requirement imposed by the court below holds the Pueblo to a higher standard than that adopted by this Court in gender-based discrimination cases outside the Indian area. *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Reed v. Reed*, 404 U.S. 71 (1971).

The court below dismisses the Pueblo ordinance as "arbitrary and expedient", "inasmuch as it originates from practical economic considerations" (540 F.2d at 1048), and states:

> "The instant tribal policy is of relatively recent origin and so it does not merit the force that would be attributable to a venerable tradition."

Apparently, the court of appeals would accept enrollment criteria that discriminated on the basis of sex, if they were founded on ancient traditions instead of changed economic conditions.

Amici submit that in the case of the Pueblo there is clear historic justification for the policy of the ordinance. But even conceding the conclusion of the court below,

amici request the Court to take judicial notice of the changed situation of Indian tribes over the last 150 years. Up until the mid-1920's, most tribes were relatively immobile and isolated. Intermarriages outside the immediate tribal group were relatively infrequent,* and could be handled on an informal, *ad hoc* basis. With the advent of the automobile, the number of intermarriages outside the tribe increased dramatically. Confronted with the possibility of loss of identity, tribes adopted formal, selective enrollment ordinances to deal with this new problem.

Culture and policy are necessarily dynamic. To limit the scope of tribal self-determination to preservation of old procedures, without simultaneously permitting the tribe to adopt solutions to new problems forced upon them, is to unduly confine tribal self-determination. An arbitrarily static view of tribal culture would mandate assimilation of Indians as changing circumstances impinge upon their traditional communities. Such an approach flies in the face of established federal policy toward Indian tribes, (see *The American Indians—Message from the President of the United States*, 116 Cong. Rec. 23131-32 (1970)), and finds no support in the language or legislative history of the 1968 Act.

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* Indeed, to avoid congenital infirmities stemming from interbreeding, Indian tribes traditionally held fairs in the Spring of the year, attended by even hostile tribes, so that the young men and women could find mates from the outside.

CONCLUSION

For these reasons, *amici* urge the Court to grant the petition for certiorari and to consider the important questions of first impression that it presents.

Respectfully submitted,

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DEC 1 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO, *et al.*,

Petitioners,

v.

JULIA MARTINEZ, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE SENECA NATION OF INDIANS OF NEW YORK AND THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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December, 1976

Washington, D.C. • THIEL PRESS • (202) 638-0521

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO, *et al.*,

Petitioners,

v.

JULIA MARTINEZ, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 42(3), the Seneca Nation of Indians of New York and the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016, move the Court for leave to file the attached brief *amici curiae* in support of the Petition for Certiorari in the above-captioned case. The petitioners, Santa Clara Pueblo and its chief executive, have consented to the filing of this brief; the respondents, Julia Martinez, *et al.*, have refused so to consent.

The Seneca Nation is a federally recognized Indian tribe which governs reservations located in the State of New York. Consistent with ancient Seneca custom and tradition, membership in the Nation and inheritance with respect to land descend only through the female line.

The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the laws of the State of New York for the purpose, *inter alia*, of protecting the rights of self-government exercised by American Indian tribes. The Association is the largest Indian interest organization in the United States and has a national membership of 50,000 that includes both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and in the filing of *amicus curiae* briefs in *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87 (8th Cir. 1975), *cert. granted*, No. 75-562 (May 24, 1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972); *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968); and *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965).

The Tribe and the Association file this motion because of the far-reaching impact of the decision below on the membership ordinances of virtually every Indian tribe. The Court is respectfully referred to the statement of Interest of *Amici Curiae* appearing at pages 5-7 of the accompanying brief.

Respectfully submitted,

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December 1, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO, *et al.*,

Petitioners,

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BRIEF *AMICI CURIAE* OF THE SENECA NATION OF INDIANS OF NEW YORK AND THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICI CURIAE*

The Seneca Nation is a federally recognized Indian tribe which governs reservations located in the State of New York. The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the laws of the State of New York for the purpose, *inter alia*, of protecting the rights of self-government exercised by Indian tribes.

This case presents a question of great and continuing concern to the *amici curiae* and to all Indian tribes—whether the Indian Civil Rights Act of 1968 prohibits Indian tribes from maintaining their traditional criteria for tribal membership or from establishing membership standards reflective of tribal cultural values and practices. In the present case, the *amici curiae* are concerned with this broad question in a specific context—namely, whether the equal protection provision of the Indian Civil Rights Act, 25 U.S.C. §1302(8), renders invalid an ordinance adopted by the Santa Clara Pueblo and applied in an evenhanded manner which bars membership to children born of marriages between female members of the pueblo and non-members.[1]

In terms of its potential impact on American Indian tribes, the importance of this question cannot be overstated.[2] *See* COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*,

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[1]The *amici curiae* do agree, however, that once a membership law has been enacted, it must be enforced evenhandedly, and, moreover, that the equal protection provision of the Indian Civil Rights Act can be utilized to stop the discriminatory application of tribal enrollment laws.

[2]Virtually every tribal enrollment ordinance discriminates to the extent of excluding certain persons from membership. The membership laws of most tribes require that one parent be a member, and that the applicant possess a minimum degree of Indian blood (*e.g.*, Shoshone Indian Tribe). The specific blood quantum, however, varies considerably, ranging from one-half (*e.g.*, Havasupai Tribe) to no minimum (*e.g.*, Santa Clara Pueblo). Some tribes specify that an applicant must possess a minimum quantum of the blood of the tribe of a particular reservation—regardless of the applicant's total degree of Indian blood (*e.g.*, Assiniboine and Sioux Tribes of the Fort Peck Reservation, Sioux Tribe of the Standing Rock Reservation, Shoshone Indian Tribe, and Northern Arapahoe Tribe). Others discriminate by imposing residency requirements (*e.g.*, Shoshone-Bannock Indian Tribe). In a number of Indian tribes, membership descends according to the father's

[Footnote continued]

132-37 (1942 ed.). The Court has long recognized that membership in an Indian tribe represents the equivalent of citizenship, and that the right of a tribe to define its standards for citizenship is an indispensable prerequisite to self-preservation and integrity as a socially and culturally unique Indian nation. *See Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897); *Nofire v. United States*, 164 U.S. 657 (1897).

Over the years, as circumstances and times have changed, tribes of their own accord and by democratic process have made changes in the requirements for enrollment. The decision below, however, would impose the external standards of the non-Indian society on the enrollment criteria of the tribes. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976).

STATEMENT OF THE CASE

For purposes of this brief, *amici curiae* adopt the "Statement of the Case" found in the Petition for a Writ of Certiorari at pages 7-10.

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blood line (*e.g.*, Sac and Fox Tribe of Iowa, Northern Arapahoe Tribe, Mohawk Tribe, and San Ildefonso Pueblo), while in others, membership follows the mother's blood (*e.g.*, all New York Iroquois Indian tribes except Mohawk).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW UNLAWFULLY DEPRIVES INDIAN TRIBES OF THEIR SOVEREIGN IMMUNITY FROM SUIT IN CASES INVOLVING THE EXERCISE OF THEIR GOVERNMENTAL POWERS.

The issue presented herein is one of first impression. The Court has never had occasion to determine whether the Indian Civil Rights Act constituted an express waiver of tribal sovereign immunity. The sovereign status of Indian tribes, evidenced by treaty and recognized judicially since the earliest days of the Republic, is beyond question. *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *Talton v. Mayes,* 163 U.S. 376 (1896); *Toledo v. Pueblo de Jemez,* 119 F. Supp. 429 (D.N.M. 1954). As a concomitant of sovereignty, tribes are immune from suit without an express waiver of immunity by a tribe or by the Congress. *United States v. United States Fidelity Co.,* 309 U.S. 506 (1940); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967); *Maryland Casualty Co. v. Citizens Nat'l Bank,* 361 F.2d 517 (5th Cir. 1966); *Haile v. Saunooke,* 246 F.2d 293 (4th Cir.), *cert. denied sub nom. Haile v. Eastern Band of Cherokee Indians,* 355 U.S. 893 (1957). Indeed the circuit court below has recognized previously that an express congressional authorization is required to permit federal court jurisdiction over a dispute between a tribe and its members. *Dicke v. Cheyenne-Arapaho Tribes, Inc.,* 304 F.2d 113 (10th Cir. 1962); *Native American Church v. Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959).

The decision of the Tenth Circuit Court of Appeals contravenes a clear line of decisional law establishing the principle that sovereign immunity is not waived by implication, and that an express waiver is required to grant jurisdiction to the courts. *United States v. King,* 395 U.S. 1 (1969).[3]

Both the district and circuit courts below failed to respect the assertion of sovereign immunity by petitioner Santa Clara Pueblo and by its chief executive. 540 F.2d at 1042; 402 F. Supp. at 7-11. In denying petitioners' motions to dismiss for lack of jurisdiction, the courts below found waivers of tribal immunity in the 1968 Indian Civil Rights Act. Yet nowhere is an express waiver of such immunity to be found in the Act. This Court has never ruled that the Act affected tribal sovereign immunity.[4] The *amici curiae* respectfully submit that the Court should grant the petition of the Santa Clara Pueblo to correct the erroneous assertion of jurisdiction below,

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[3]The instant case attacks a governmental act of the sovereign which distinguishes it from modern trends disfavoring immunity in actions arising from the commercial activities of the sovereign. *See Alfred Dunhill of London v. Republic of Cuba,* ___U.S. ___, 44 U.S.L.W. 4665, 4669-70, (U.S. May 24, 1976).

[4]Decisions of the lower courts are in conflict with respect to whether §1302 of the Indian Civil Rights Act is a waiver of immunity. *Compare Wounded Head v. Tribal Council of the Oglala Sioux Tribe,* 507 F.2d 1079 (8th Cir. 1975); *Pinnow v. Shoshone Tribal Council,* 314 F. Supp. 1157 (D. Wyo. 1970), *aff'd on other grounds sub nom. Slattery v. Arapahoe Tribal Council,* 453 F.2d 278 (10th Cir. 1971); *Yellow Bird v. Oglala Sioux Tribe,* 380 F. Supp. 438 (D. S.D. 1974); *Jacobson v. Forest County Potawatomi Community,* 389 F. Supp. 994 (D. Wis. 1974) *with Martinez v. Santa Clara Pueblo, supra; Dry Creek Lodge, Inc. v. United States,* 515 F.2d 926 (10th Cir. 1975); *Brown v. United States,* 486 F.2d 658 (8th Cir. 1973); *Johnson v. Lower Elwha Tribal Community,* 484 F.2d 200 (9th Cir. 1973); *Daly v. United States,* 483 F.2d 700 (8th Cir. 1973).

to resolve the conflict in the circuits and to direct the dismissal of this action against petitioners as a violation of the sovereign immunity which resides in all Indian tribes.

II.

THE CASE PRESENTS AN ISSUE OF GREAT IMPORTANCE TO ALL INDIAN TRIBES.

A. The Decision Below Unjustifiably Restrains Tribal Self-Determination in the Establishment of Membership Criteria.

The circuit court's opinion in this case holds that petitioners' 1939 enrollment ordinance violates the equal protection clause of the Indian Civil Rights Act because the ordinance bases enrollment eligibility of children of mixed marriages upon the sex of the parent who is an enrolled member of the pueblo. 540 F.2d at 1048. In so holding, the court of appeals purported to apply current Fourteenth Amendment equal protection standards to a gender-related classification in the pueblo ordinance, and asserted the absence of a "compelling interest" (540 F.2d at 1047) of the pueblo in maintaining the 1939 enrollment ordinance—a test never accepted by a majority of this Court even in non-Indian cases dealing with gender-related classifications. (*See* note 7 & p. 15 *infra*.)

The opinion of the Tenth Circuit Court of Appeals in this case is the first instance in which Fourteenth Amendment equal protection standards, as distinct from the standard of evenhanded application, have been applied to a tribal ordinance governing a non-Anglo-American institution, here membership in the pueblo. This unprecedented action of the circuit court seriously infringes upon tribal self-determination in the vital area of membership. With the single exception of enrollment for purposes of certain federal programs not here

relevant, Indian tribes historically have exercised unlimited authority in determining standards for membership, subject only to express congressional enactments. *See Cherokee Intermarriage Cases, supra; Roff v. Burney, supra; Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958); *Smith v. Bonifer*, 154 F. 883 (C.C. Ore. 1907); COHEN, *supra*, at 133-37. This aspect of sovereignty, as no other, permits tribes to maintain their cultural identity by defining, through their duly constituted leaders, who shall be members.[5] The Tenth Circuit opinion below,

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[5]The *amici curiae* request the Court to take judicial notice of the changed situation of Indian tribes over the last 150 years. In the Nineteenth Century, tribes were rather immobile and isolated. Hence, intermarriages outside the immediate tribal group were relatively infrequent, and could be handled on an informal, *ad hoc* basis. With the advent of the automobile, however, the contact of tribes with the majority culture and with each other increased dramatically, and therewith the number of intermarriages outside the tribe. Confronted with the possibility that specific tribal cultures would disintegrate if large numbers of outsiders were enrolled as members, tribes such as the Santa Clara Pueblo adopted formal, selective enrollment ordinances.

The Tenth Circuit dismisses the solution achieved by the pueblo as "arbitrary and expedient", "inasmuch as it originates from practical economic considerations", 540 F.2d at 1048, and states:

> The instant tribal policy is of relatively recent origin and so it does not merit the force that would be attributable to a venerable tradition.

Id. The *amici curiae* agree that ancient traditions are worthy of great respect. But to limit the scope of tribal self-determination to preservation of old procedures, without permitting Indian solutions to new problems forced upon the tribes, is to take an arbitrarily static view of tribal culture. This view effectively mandates that Indians conform to majoritarian values in responding to changing circumstances within their communities. Such an approach is indefensible and flies in the face of established federal policy toward Indian tribes. S. Con. Res. 26, 92d Cong., 1st Sess., 117 CONG. REC. 46383 (1971).

which allows a non-Indian court, sharing no trace of tribal cultural values, to second-guess Indian leaders in matters of evenhandedly-applied tribal membership criteria, constitutes a debilitating and statutorily unwarranted interference in this process of self-definition. As was recognized by the district court below:

> To abrogate tribal decisions, particularly in the delicate area of membership, for whatever "good" reasons, is to destroy cultural identity under the guise of saving it.

402 F. Supp. at 18-19.

B. The Decision Below Contravenes the Legislative History of, and Precedents Construing, the Equal Protection Clause of the 1968 Indian Civil Rights Act, 25 U.S.C. §1302(8).

The position of the Congress on Indian civil rights legislation, and congressional rejection of bills which would have rendered tribes subject to the full range of restrictions on governmental power contained in the Constitution, is evident from the face of the legislative history of the 1968 Act. *Compare Hearings on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 26 (1968) *with Hearings on Constitutional Rights of the American Indian, S. 961-68 & S.J. Res. 40, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965); Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. LEGIS. 557, 617-19, 621-22 (1972); Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337, 351 (1969); *see generally* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969). The strong position of the Congress in favor of increasing, rather than diminishing, self-determination in all aspects of tribal government is also expressed in a resolution defining federal policy toward Indians adopted subsequent to passage of the 1968 Act. S. Con. Res. 26, 92d Cong., 1st Sess., 117 CONG. REC. 46383 (1971).

The Tenth Circuit's decision below flatly contravenes the congressional intent embodied in the Indian Civil Rights Act and in the 1971 federal policy statement. The cultural integrity which the Congress so carefully worked to preserve will be lost irretrievably if, as the decision below implies, self-determination does not extend to the decision of who is a member of a tribe (and thus who shall be included in determining which cultural traditions shall be preserved or built upon). Nor is this threat to the cultural sovereignty of tribal government in accord with decisional law under the Indian Civil Rights Act in sister circuits or in previous Tenth Circuit decisions.[6]

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[6]The Eighth and Ninth Circuits, for example, have evolved a test which *amici curiae* believe to comport with the legislative intent and history of the Indian Civil Rights Act equal protection clause: If the tribal institution or procedure giving rise to an action is borrowed from Anglo-American governmental tradition, Fourteenth Amendment equal protection precedents apply. *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973) ("one-man, one-vote" principle applied to tribal election district apportionment); *accord, Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976). If, by contrast, an action arises outside the context of traditional Anglo-American jurisprudence, *i.e.*, in a uniquely Indian setting, the applicable equal protection standard under the Indian Civil Rights Act is the non-discriminatory administration of the tribal legislation, or "evenhandedness". *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973) (blood quantum requirements for tribal officeholders upheld); *accord, Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079

The failure of this Court to review the Tenth Circuit decision below will deluge the federal courts with new litigation requiring intimate familiarity with tribal cultures and traditions alien to non-Indian judges. The delicate balancing of intra-tribal interests demanded in resolving enrollment controversies is a process for which non-Indian courts are unqualified, and thus, such balancing in all likelihood will not occur. In addition, an indefensible drain on tribal resources will be entailed if each tribe must convincingly prove the elements of its culture to a federal judge who may be unsympathetic to those cultural traditions, and who is presented by a plaintiff with arguments based upon the Anglo-American legal tradition in which he has been trained.

The *amici curiae* suggest that this is an opportune moment, while the equal protection clause of the Indian Civil Rights Act is still in its infancy, for the Court to implement the Congressional intent behind this statute, and to assure correct and uniform construction of the Act among the circuits, by granting the writ in this case.

(8th Cir. 1975); *Yellow Bird v. Oglala Sioux Tribe*, 380 F. Supp. 438 (D. S.D. 1973) (Fourteenth Amendment standards held inapplicable in sole previous federal court decision resting on the application of the Indian Civil Rights Act equal protection clause to tribal membership standards). These cases demonstrate a sensitive approach to the serious question of tribal cultural sovereignty and self-determination under the Indian Civil Rights Act. *See*, Burnett, *supra*, 9 HARV. J. LEGIS. at 617-19, 621-22.

III.

THE COURT BELOW APPLIED AN IMPROPER EQUAL PROTECTION STANDARD TO THE 1939 PUEBLO ENROLLMENT ORDINANCE.

Assuming, *arguendo*, the applicability of recently-evolved notions of equal protection, the *amici curiae* urge the Court to reject the imposition of a strict "compelling interest" test in this case.[7] Indeed a majority of the Court has never accepted this test for gender-based discrimination. To the contrary, the Court has consistently applied a rationality test which focuses on the legitimacy of the governmental interest in determining whether gender-based actions violate the equal protection clause of the Constitution. *See Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Reed v. Reed*, 404 U.S. 71 (1971). Surely, no stricter test should now be imposed in the tribal setting without due consideration by the Court.

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[7]It should also be noted that the stringent standard of equal protection relied upon by the Tenth Circuit in holding the 1939 pueblo ordinance invalid is itself hardly a "venerable tradition" of Anglo-American jurisprudence. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065,1076-132 (1969); Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 33-34 (1972). This modern doctrine, if considered as a part of Anglo-American culture, constitutes a clear break with tradition, and arises in response to specific problems confronting the majority population at a particular time. Courts should be circumspect in assuming the universal applicability of evolving Fourteenth Amendment notions to qualitatively different cultures, facing different problems and proceeding from different historical bases. Such circumspection is absent from the circuit court's decision below.

CONCLUSION

For the foregoing reasons, the *amici curiae* urge the Court to grant the petition for a Writ of certiorari and to consider the important questions of first impression therein presented.

Respectfully submitted,

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December 1, 1976

MOTION FILED
DEC 22 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO and LUCARIO PADILLA, individually and as Governor of SANTA CLARA PUEBLO,
Petitioners,

v.

JULIA MARTINEZ, on behalf of herself and all others similarly situated, and AUDREY MARTINEZ, on behalf of herself and all others similarly situated.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE OF THE PUEBLO DE COCHITI, THE PUEBLO OF ISLETA, THE PUEBLO OF JEMEZ, THE PUEBLO OF LAGUNA, THE PUEBLO OF SANDIA, THE PUEBLO OF SAN FELIPE, THE PUEBLO OF SAN ILDEFONSO, THE PUEBLO OF TAOS, THE HUALAPAI TRIBE, THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION AND THE ALL-INDIAN PUEBLO COUNCIL, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO and LUCARIO PADILLA, individually and as Governor of SANTA CLARA PUEBLO,
Petitioners,

v.

JULIA MARTINEZ, on behalf of herself and all others similarly situated, and AUDREY MARTINEZ, on behalf of herself and all others similarly situated.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

MOTION TO FILE BRIEF AMICI CURIAE

Come now The Pueblo de Cochiti, the Pueblo of Isleta, The Pueblo of Jemez, The Pueblo of Laguna, The Pueblo of Sandia, The Pueblo of San Felipe, The Pueblo of San Ildefonso, The Pueblo of Taos, The

Hualapai Tribe, The Salt River Pima-Maricopa Indian Community, The Confederated Tribes of the Umatilla Indian Reservation and The All-Indian Pueblo Council, Inc., by and through their attorneys, and allege:

1. The movants herein other than the All-Indian Pueblo Council, Inc., are Indian tribes duly recognized by the Federal Government, exercising powers of self-government and subject to the provisions of the Act of April 11, 1968 (84 Stat. 77 et seq.; 25 U.S.C., Sections 1301 et seq.) hereinafter called the Indian Civil Rights Act (ICRA).

2. The All-Indian Pueblo Council Inc., is an organization consisting of the nineteen Indian Pueblos located in New Mexico, duly chartered as a non-profit corporation under the laws of the State of New Mexico, the purpose of which is to act in concert for the advancement of goals common to the Indian Pueblos of New Mexico.

3. Consent has been obtained from the Petitioners to file this motion and a brief *amici curiae* in this cause. Consent has not been obtained from the Respondents.

4. The tribes, pueblos and organizations herein named, wish to submit a brief *amici curiae* in support of the Petition for Writ of Certiorari heretofore submitted by the Petitioners.

5. The basic questions of law herein are:

(1) Does the ICRA vest the Federal Courts with the jurisdiction to determine questions of tribal membership?

(2) If the Federal Court does have such jurisdiction, does the Indian Civil Rights Act prohibit an Indian tribe, in the exercise of self-government powers, from enacting or enforcing an ordinance which imposes different membership standards on the acquisition of tribal membership, based on the sex of the member parent of a child seeking membership?

These questions are of utmost concern and importance to the movants herein for the reason that the decision of the Tenth Circuit in *Martinez, et al.* v. *Santa Clara Pueblo, et al.*, No. 75-1615, reported at 540 F.2d 1039, will, if allowed to stand without review by this Court, severely cloud the long standing exclusive authority of these pueblos and tribes to determine their own membership and to determine the membership standards now in force among these pueblos and tribes and other Indian tribes in the United States and will also cause serious disturbance of religious, cultural and traditional patterns of living in these tribes and pueblos.

6. The above questions of law will not be adequately presented to this Court for the reason that the facts presented to the trial Court, as reviewed by the Tenth Circuit, do not and cannot show the impact of this question of law upon the religious, cultural and traditional patterns of living in these tribes and pueblos.

WHEREFORE, the above-named tribes and pueblos and the All-Indian Pueblo Council, Inc., respectfully move this Court for an Order allowing them to file a brief

amici curiae in support of the Petition for Writ of Certiorari filed in this cause.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMICI CURIAE

I.

INTEREST OF AMICUS CURIAE

Each of the pueblos and tribes represented herein are duly recognized Indian tribes under the administrative jurisdiction of the United States Department of the Interior. Each of these tribes except the Pueblo of

Jemez, has accepted the Act of June 18, 1934 (48 Stat. 984 et seq.; 25 U.S.C., Sec. 461 et seq.). The Pueblos of Laguna and Isleta and the Hualapai Tribe and Salt River Pima-Maricopa Indian Community have adopted Constitutions pursuant to Section 16 of said Act (48 Stat. 987; 25 U.S.C., Sec. 476). The Confederated Tribes of the Umatilla Indian Reservation have adopted a Constitution dated November 4, 1949, approved by the Secretary of the Interior on December 7, 1949. This Constitution was not adopted pursuant to the 1934 Act. The remaining tribes have not adopted constitutions under such Act of Congress, or otherwise, but are governed largely by custom and tradition, largely religious in nature.

The Isleta, Laguna, Hualapai Salt River-Pima-Maricopa and Umatilla Constitutions set forth specific membership standards, which relate to date of birth, blood quantum and marital status of parents. The Salt River Pima-Maricopa Constitution, in addition, authorizes membership procedures by Ordinance of the Council. True copies of the Isleta, Laguna, Hualapai, Salt River Pima-Maricopa and Umatilla Constitutions, as the same refer to membership standards are attached as Appendices A through E, inclusive.

San Ildefonso Pueblo has enacted an ordinance, dated August 26, 1975, which prohibits women members who marry non-members from residing on the reservation, a prohibition that does not apply to male members who marry non-members. This ordinance is a codification of long-existing traditional rules, based on religion, land holdings and tradition. A true copy of the San Ildefonso Pueblo Ordinance, and the affidavit of Governor James R. Martinez are attached as Appendices G and F.

The other Pueblos herein represented have no Constitutional or other written membership rules which create distinctions based on sex. However, the traditional unwritten rules of Cochiti Pueblo and Isleta Pueblo (see Appendix H and Appendix L) and other Pueblos show a general consistency with the practices at San Ildefonso.

While Isleta and Laguna Pueblos and the Hualapai Tribe, the Salt River Pima-Maricopa Indian Community and the Confederated Tribes of the Umatilla Indian Reservation have assimilated some of the Anglo ways in forming their Tribal governments; nevertheless, there is a traditional background in connection with each of the membership standards prescribed in their respective constitutions.

The point is that the governmental structure of all the pueblos, including those which have adapted written codes, is part and parcel of larger tradition, based primarily on unanimity of action. This is clearly set forth in some detail in the report entitled "*The Pueblo Social Organization as the Basis for Rules of Tribal Membership*" by Dr. Florence Hawley Ellis (hereinafter "Ellis"). The Ellis Report is attached to this brief as Appendix K.

The concern of the tribes other than the pueblos is a fear that if the Tenth Circuit decision stands as the law, no standard of tribal membership will be free from doubt.

The end result of this litigation will, therefore, have a serious impact upon the tradition, culture and religion of these pueblos and other tribes similarly situated. If the decision is allowed to stand, a substantial number of Tribal Constitutions, Ordinances, rules and

traditional practices, including religious practices, will have questionable validity. The basic questions are: (1) Do the Federal Courts have jurisdiction in tribal membership disputes, and (2) Can an Indian tribe, in the exercise of self-government, discriminate on the basis of sex or other basis which, in strict Fourteenth Amendment nomenclature is discriminatory, but which is in accord with long standing cultural and religious values. These questions are of such overwhelming importance to these tribes, and so fundamental to Indian governmental, social and religious structure that a review of the Tenth Circuit decision by this Court is imperative.

II.

ARGUMENT

POINT ONE

The Decision of the Tenth Circuit Runs Counter to Prior Judicial Decisions Regarding Tribal Membership, Both Before and After the Enactment of the ICRA.

Prior to the enactment of the Indian Civil Rights Act on April 11, 1968 (84 Stat. 77; 25 U.S.C., Section 1301 et. seq). (hereinafter "ICRA"), the Courts would not and did not inquire into tribal membership standards or tribal property inheritance laws. *Raff* v. *Burney,* 168 U.S. 218, 18 S. Ct. 60, 42 L.ed. 442 (1897); *Martinez* v. *Southern Ute Tribe,* 249 F.2d 915 (10th Cir. 1957); *Simmons et al.* v. *Seelatsee,* 222 F. Supp. 808 (D.C. Wash. 1965), affirmed 384 U.S. 209, 86 S. Ct. 1459, 16 L.ed. 2d 480. The tribes had the sole authority to determine their own membership and membership qualifications and standards. *Martinez* v. *Southern Ute Tribe, supra, Bonifer* v. *Smith,* 154 Fed. 883 (D.C. Ore. 1907).

The rule, prior to the ICRA, was clearly stated by the eminent authority on Federal Indian law, Felix S. Cohen in his *Handbook of Federal Indian Law,* U.S. Department of the Interior, G.P.O., 1941, at page 133:

> "The Courts have consistently recognized that in the absence of *express* legislation by Congress to the contrary, an Indian Tribe has complete authority to determine all questions of its own membership. It may thus, by usage or written law, or by treaty with the United States or inter-tribal agreement, determine under what conditions persons may be considered members of the tribe (emphasis supplied).

It must be kept in mind that the power to determine membership and all other inherent tribal powers are reserved powers and not powers granted to the tribes by the United States. *Worchester* v. *Georgia,* 6. Pet. 515 (1832); *Cherokee Nation* v. *Georgia,* 5 Pet. 1 (1831); *United States* v. *Winans,* 198 U.S. 371, 25 S. Ct. 662, 49 L. ed. 1089 (1905) Fish. 3; *United States* v. *Washington,* 384 F. Supp. 312, 407 (W.D. Wash. 1974).

Has the enactment of the ICRA changed this rule? Is the ICRA *express* legislation allowing inquiry into tribal membership standards? In particular, does the "equal protection" clause of 25 U.S.C., Sec. 1302 (8) now grant to the Federal judiciary the power to inquire into the standards established by Tribes to regulate their own membership? In *Slattery* v. *Arapahoe Tribal Council,* 453 F. 2d 278 (10th Cir., 1971), the Court indicated, without deciding, that the ICRA might change the former rule that the Federal Courts had no jurisdiction to inquire into tribal membership questions. However, the Federal Courts, in post-ICRA cases,

have been loath to interfere with tribal membership standards. Thus, in *Yellowbird* v. *Oglala Sioux Tribe of South Dakota,* 380 F. Supp. 438 (D.C. S.D. 1974), it was held that tribal membership provisions are not subject to judicial examination for alleged "equal protection" violations unless it could be shown that these standards were not uniformly applied. See also *Daly* v. *United States et al.,* 483 F.2d 700 (8th Cir. 1973) and *Slattery* v. *Arapahoe Tribal Council, supra.*

The rationale of the Courts has been that membership is a matter involving substantial tribal interest and that tribal decisions must not be lightly overturned by the imposition of Anglo-Saxon standards of justice on alien cultures. *McCurdy* v. *Steele,* 506 F.2d 654 (10th Cir. 1974); *Yellowbird* v. *Oglala Sioux Tribe of South Dakota, supra.* We submit that the basic post-ICRA rule has been: Start with the presumption that an Indian tribe has the inherent power to determine its own membership and establish membership standards, in the exercise of its internal sovereignty and to preserve its cultural integrity, alien to the Anglo culture. Presume also that the membership has been determined to accomplish these objectives. Look only to the factual question of whether or not the standard has been applied uniformly and then only if there is *no* uniformity in application, must relief be granted. This approach is completely consistent with the position taken by Mr. Cohen, cited above. It recognizes that tribal membership is a matter inherently within the orbit of tribal self government.

We submit that the approach we have stated recognizes the fundamental fact the membership in an Indian tribe is completely tied in with cultural norms established by the tribes. This is most emphatically so

with the New Mexico pueblos, as detailed by Ellis (Appendix K), and by the various affidavits made Appendices hereto.

The District Court in this case followed this approach. Judge Mechem ruled ". . . (T)he Act and its equal protection guarantee must be read against the background of tribal sovereignty and interpreted within the context of Tribal law and custom" 402 F. Supp. at p. 17. And he concluded "that 25 U.S.C., Section 1302 (8) should not be construed in a manner that would invalidate a tribal membership ordinance when the classification attacked is one based on criteria that has been traditionally employed by a tribe in considering membership questions." *Id.* at 18.

The Tenth Circuit attacked the question from precisely the opposite direction. After reviewing the legislature history of the ICRA, the Court concluded that since the Congress had deleted the First Amendment non-establishment clause and the Fifteenth Amendment protections Act, leaving Fourteenth Amendment equal protection guarantees in the Act, this case was, essentially, a standard Fourteenth Amendment equal protection case, only inferentially involving an Indian context. *Opinion,* pp. 10-14. The Court said, *Id.* p. 14 "The legislative proceedings do manifest a congressional intent to recognize the specific guarantee unless the tribal custom or principle outweighs the specific guarantee "*Id.,* p. 14. From that statement, the Court posed the essential question, as it viewed the matter: "And so we ask the question whether a tribe may extend to men members fundamental rights while simultaneously denying the same rights to its women" *Id.,* p. 14.

We submit that the Circuit Court, by thus viewing the problem, took an approach radically different from the approach heretofore taken by the Federal Courts on such questions. The Tenth Circuit approach assumed that the Santa Clara membership ordinance would, if set in an outside context, clearly violate Fourteenth Amendment equal protection standards and therefore, placed the burden on Santa Clara to show an overriding reason why its membership standard should stand, as viewed against this outside standard. This approach is, we submit, a substantial deviation from the approach taken by the Eighth Circuit in *Daly*, the Ninth Circuit in *Laramie* v. *Nicholson*, 487 F. 2d 315 (9th Cir. 1973), and in its own previous decisions in *Slattery* and *Groundhog* v. *Keeler*, 442 F. 2d 674 (10th Cir. 1971).

The confusion resulting from this change in direction from its own prior decisions and from the basis used by other circuits in and of itself merits the granting of the Petition for Writ of Certiorari in this case. Only this Court can establish the proper perspective from which the Circuits can view individual Indian attacks on tribal actions resulting from powers inherent in tribal sovereignty and based on traditional and cultural concepts foreign to established Fourteenth Amendment norms.

POINT TWO

The Decision of the Tenth Circuit Ignores the Religious and Traditional Bases of the Santa Clara Membership Ordinance.

The Tenth Circuit not only put the burden on Santa Clara to show a compelling interest in the enactment of the membership ordinance of 1939, but held that the facts do not support a compelling interest. In doing so,

the Circuit Court ignored the fact findings made upon the trial. The District Court held that the Santa Clara membership policies are no more or less than a mechanism of social, and to an extent, psychological and cultural, self-definition noted in certain traditional values which have not been entirely vitiated. 402 F. Supp. at p. 15, 17. Ample evidence supports these findings.

The Circuit Courts have held that 25 U.S.C., Section 1302 (8) requires existing tribal law to be applied with an even hand. *Crowe* v. *Eastern Band of Cherokee Indians, Inc.*, 506 F. 2d 1231 (4th Cir. 1974); *Wounded Head* v. *Tribal Council of Oglala Sioux Tribe*, 507 F. 2d 1079 (8th Cir. 1975), and that some element of due process must be observed in granting or denying benefits *Crowe* v. *Band of Cherokee Indians, Inc., supra.; Johnson* v. *Lower Elwha Tribal Community*. 484 F.2d 200 (9th Cir. 1973); *O'Neal* v. *Cheyenne River Sioux Tribe*, 482 F. 2d 1140 (8th Cir. 1973). All of these decisions presuppose the basic validity of tribal classifications and look to the application of these classifications in particular instances to determine even-handedness and due process. It is assumed that 25 U.S.C., Sec. 1302 (8) should not be construed to invalidate a tribal classification based on traditionally employed criteria. There is ample evidence in the instant case supporting such criteria. The Tenth Circuit ignored these traditional criteria and applied standard Fourteenth Amendment standards, applicable to State action, to decide the case.

We submit that the Circuit Court, by ignoring the traditional value base from which the 1939 Santa Clara Ordinance was enacted, seriously limits any Indian tribal standard value as the basis of tribal legislative

enactment and places tribal values at the mercy of standard non-Indian Fourteenth Amendment equal protection norms. This approach has not been used in any number of ICRA cases, cited above. The rule has been and, we submit, should be that only as a tribe incorporates non-Indian standards as the bases of its internal operations and rules, should the actions of the tribe be viewed in the context of non-Indian Fourteenth Amendment norms. *Daly* v. *United States, et al., supra.*

POINT THREE

The Circuit Court's Decision Has a Serious Impact Upon the Customs, Traditions, Religion and Sovereignty of the Pueblos of New Mexico

The decision of the Circuit Court will cause serious problems with the New Mexico Pueblos and other tribes. It will cast grave doubt on long-established membership standards. For example, Article II of the Pueblo of Laguna Constitution (Appendix A) provides, at Section 1(d)(1) and (2) a clear distinction between the membership rights of certain children based in part on the sex of the member parent. Under the Circuit Court's decision, the classifications of 1(d)(1) as opposed to 1(d)(2) are placed in serious doubt. Yet, there was, from the tribal view, ample reason for this classification (See Appendix I). The Pueblo of San Ildefonso Ordinance of August 26, 1975, while not addressed to membership per se, would also be under serious question (Appendix G). It is, in fact, now the subject of an ICRA attack in *McReynolds* v. *Pueblo of San Ildefonso;* No. 75-638-P, USDCNM, filed June 29, 1976. Yet, this ordinance is a reiteration of existing custom with ample factual basis, in the context of San Ildefonso custom (Appendix G).

The affidavits of Jerry Quintana (Cochiti), Juan de Jesus Romero (Taos), and Seferino Lente (Isleta) (Appendices H, J and L) show a number of male-dominance rules that can, and most assuredly will, be subject to Court attack if the decision of the Tenth Circuit is allowed to stand. Thus, the conclusions of Ellis that this case has the potential of upsetting or destroying entire social structures is substantiated by the Pueblo people themselves.

The ICRA was not intended by Congress to impair the internal structure tribal governments, especially those tribal governments who operate on a tradition which has a religious base. This is abundantly clear from a legislative history of the act. This history is alluded to in some detail by the Circuit Court. *Opinion,* p. 9-10. Suffice it to say that S.961, the original bill, would have subjected tribes to the same constitutional civil rights restraints as are imposed by the Federal Constitution. However, this bill was not enacted and, instead, S.1843 became the ICRA. S.1843 was the result, in part, of Congressional recognition of the very problem we now face, ie., the potential of non-Indian equal protection standards causing chaos in tribal membership standards. The testimony of Arthur Lazarus, Jr., on behalf of the Association of American Indian Affiairs (*Hearings, Sub-Committee on Constitutional Rights, Senate Committee on the Judiciary,* 89th Cong., 1st Sess., G.P.O., 1965), clearly illustrates the problem.

> "* * * Secondly, S.961 unintentionally would impair tribal sovereignty in areas unrelated to individual rights and on matters where change would be, and is, opposed by an overwhelming majority of the people. Among the Indian nations in the State of New York, for example, eligible for tribal

membership descends exclusively through the female line and, in addition, only tribal members may qualify to inherit interests in reservation land-both traditional practices which the Senecas and Tuscaroras clearly wish to preserve, but which might be barred by the equal protection clause or some other provision of the Constitution. Similarly, constitutional principles regarding the separation of church and state could cause serious difficulties among some of the Pueblos in New Mexico, while the doctrine of "one man, one vote" has no valid application to an Indian tribe still governed by a chiefs council. * * *"

The matters illustrated by Mr. Lazarus, among others, are precisely the reason that S. 1843, instead of S. 961, became law.

The problem is also put in focus by reference to certain hearings held in Albuquerque, New Mexico on April 11, 1969 before Senator Sam Ervin. *See Amendments to the Indian Bill of Rights, Hearing, Subcommittee on Constitutional Rights, Senate Committee on the Judiciary,* 91st Cong., 1st Sess., on Title II of the Civil Rights Act of 1968. Concern was expressed by the Pueblo leaders that the 1968 Act, in particular "equal protection", could severely impair existing Pueblo governments. The following remarks by Senator Ervin are pertinent:

* * * "I would question whether the clause in the bill stating that those who rule shall see that people have *equal protection* of the laws would change your method of selecting leaders at all. In other words, the object of the clause is merely to prohibit leaders from having one law for one man and a different law for another man in the same situation. So I don't think that you are going to have the one-man, one-vote system thrust on you under

this act. You would retain your individual Pueblos, which correspond to the States, and certain things would be left to them. I assume you have your overall All Pueblo Council for all of the Pueblos, like the Federal Government. Certainly it is not the purpose of this act to change your form of government, especially regarding the manner in which you chose officers. I don't believe that that is really something you have to fear." * * *

Likewise, it would seem that membership standards and qualifications and other standards based on sex differentiations should not be upset under a notion of "equal protections". These standards are part and parcel of tradition and a government based on such tradition.

The Circuit Court has, in effect, reversed the process by going back to S.961 standards. The Court has also ignored judicial precedent which recognized this premise, including its own prior pronouncements. *Groundhog* v. *Keeler, supra; Lohnes* v. *Cloud,* 366 F. Supp. 619 (D.C. N.D. 1975); *Solomon* v. *La Rose,* 325 F. Supp. 715, 718 (D.C. Neb. 1971); *Wounded Head* v. *Tribal Council of Oglala Sioux Tribe, supra.; McCurdy* v. *Steele,* 353 F. Supp. 629 (D.C. Utah 1973).

III.

CONCLUSION

This Court must grant the Petition for Writ of Certiorari filed by the Petitioner Pueblo of Santa Clara, in order to establish the fundamental principle that Tribal membership standards and associated internal tribal rules are not the subject of sweeping application of non-Indian Fourteenth Amendment equal protection

standards to the tribes, whose traditions are based on concepts alien to such standards.

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APPENDIX

APPENDIX A

Article II—Membership

Amended Constitution and By Laws of the Pueblo of Laguna, New Mexico, Approved November 10, 1958.

Section 1. Qualifications. The membership of the Pueblo shall consist of the following persons, provided they have not renounced or do not hereafter renounce such membership by joining another tribe or otherwise, and provided further, that any person 21 years of age or over, living on the date of the approval of this revised Constitution, shall not be entitled to membership unless enrolled or unless application for enrollment has been filed within one year from the approval of this revised Constitution in the manner to be prescribed by ordinance of the Council, except as hereinafter provided in subsection (e) of this Section.

(a) All persons of any Indian blood whose names appear on the 1940 United Pueblos Agency census roll for the Pueblo of Laguna as enrolled members: provided that any person of one-half or more Laguna blood whose name the Council finds to have been erroneously omitted from said roll shall be added to it upon application by such person within one year from the approval of this revised Constitution, in the manner to be prescribed by ordinance of the Council. Any such addition shall have the effect of recognizing such person's membership from birth. Applications for recognition of membership may also be filed on behalf of a deceased person, if done for the purpose of establishing membership rights under subsections (b), (c), or (d) of this Section.

(b) All persons born since the 1940 census whose mother and father are both members of the Pueblo of Laguna.

(c) All persons of one-half or more Indian blood born after the 1940 census but prior to the approval of

this revised Constitution whose mother or father is a member of the Pueblo of Laguna.

(d) All persons of one-half or more Laguna Indian blood born after approval of this revised Constitution:

(1) whose mother is a member of the Pueblo of Laguna; or

(2) whose father is a member of the Pueblo of Laguna, provided the child is born in wedlock.

(e) Provided that the persons referred to in subsections (b), (c), (d)(1) and (d)(2), above, shall not be entitled to membership in the Pueblo unless enrolled or unless application for enrollment has been made by their parent, parents, or other persons for them, or by themselves, prior to their 22nd birthday; provided further, that all such persons shall have at least one year from the date of approval of this revised Constitution in which to enroll themselves or make application for enrollment as members of the Pueblo, in the manner to be prescribed by ordinance of the Council.

(f) All persons naturalized as members of the Pueblo of Laguna, provided that a person who has no Indian blood shall never be naturalized.

Section 2. Determination of Qualifications. The Council shall by ordinance prescribe procedures for the determination or renunciation of membership pursuant to Section 1 of this Article. All determinations made in accordance with such procedures shall be final.

Section 3. Observance of Pueblo Constitution and Laws. All members of the Pueblo of Laguna and all other persons who are permitted to live on the reservation of the Pueblo by the proper officers of the Pueblo shall be governed by this Constitution, the Bylaws and all ordinances, customs,

and regulations of the Pueblo as the same now exist or are hereafter altered, and as interpreted by the proper officers of the Pueblo. Non-members of any Indian blood may be permitted to live on the lands of the Pueblo only if they agree in writing to be governed in this way. Non-Indians may be permitted to live upon the lands of the Pueblo only if they receive written authorization from the Council and only on such terms and conditions as the Council may prescribe, but a non-Indian may not, without his consent, be subject to any punishment by the Pueblo other than expulsion for failure to abide by his written promise.

Section 4. Every member of the Pueblo of Laguna shall be entitled to an equal share in per capita distribution, provided that no right to a share shall vest in such member unless such member is an enrolled member on the date such per capita distribution in Article VIII, Section 3 of the Bylaws.

APPENDIX B

Article II—Membership

Constitution for the Pueblo of Isleta, New Mexico, Adopted February 23, 1970.

The following persons shall be members of the Pueblo of Isleta, provided such persons shall not have renounced, or do not hereafter renounce their membership by joining another tribe or pueblo, or otherwise:

Section 1. Persons of one-half (½) or more degree of Isleta Indian blood and Isleta parentage shall be members of the Pueblo of Isleta, provided they have not renounced their right to membership.

Section 2. All persons of one-half (½) or more degree Isleta Indian blood whose names appear on the official census roll maintained by Southern Pueblos Agency, as of January 1, 1970.

Section 3. All persons of one-half (½) or more degree of Isleta Indian blood born after January 1, 1970.

Section 4. Any person of one-half (½) or more degree of Indian blood who is hereafter naturalized or adopted in conformity with an appropriate ordinance of the council or according to the laws and traditions of the Pueblo of Isleta.

Section 5. No person shall be or become a member of the Pueblo of Isleta who is an enrolled member of any other Indian tribe or pueblo.

Section 6. Non-Indians shall never become members of the Pueblo of Isleta.

Section 7. The council shall have the power to adopt ordinances, consistent with this constitution, to govern future membership, loss of membership and the adoption of naturalization of members into the Pueblo of Isleta, and to govern the compilation and maintenance of a tribal roll.

Section 8. No decree of any non-tribal court purporting to determine membership in the pueblo, paternity or degree of Isleta Indian blood shall be recognized for membership purposes. The council shall have original jurisdiction and sole authority to determine eligibility for enrollment for all tribal purposes except where the membership of an individual is dependent upon an issue of paternity, in which case the courts of the pueblo shall have authority and exclusive jurisdiction.

APPENDIX C

Article II—Membership

Constitution and By Laws of the Salt River Pima-Maricopa Indian Community. Approved March 18, 1971.

Section 1. Acquisition of membership. The membership of the Salt River Mima-Maricopa Indian Community shall consist of:

(a) All persons of Indian blood whose names appear, or rightfully should appear, on the official allotment roll of the Salt River Reservation, shall be members of the Salt River Pima-Maricopa Indian Community.

(b) All descendants of members of the Salt River Pima-Maricopa Indian Community if they are of at least one-fourth (¼) degree Indian blood and are not members of any other Indian tribes. Descendants possessing less than one-fourth (¼) degree Indian blood may be admitted to membership by a majority vote of the community council.

(c) Such other persons as the community council may see fit to admit to membership under rules of uniform application, provided no person may be admitted to membership unless he is a United States citizen and is a direct descendant of a member of the Salt River Pima-Maricopa Indian Community or is married to a member and has at least one-fourth (¼) degree Indian blood of a recognized Indian tribe.

(d) No decree of an outside court determining membership in the Salt River Pima-Maricopa Indian Community shall be recognized by the Salt River Pima-Maricopa Indian Community for membership purposes. All questions relating to the paternity of an applicant for enrollment shall be decided by the

tribal court and the decision of the court shall be final.

Section 2. Future membership. The community council shall have the power to pass ordinances subject to approval by the Secretary of the Interior or his authorized representative governing future membership, and the adoption of members by the Salt River Pima-Maricopa Indian Community.

Section 3. Membership roll. The community council shall provide for the establishment and maintenance of an up-to-date roll of members of the Salt River Pima-Maricopa Indian Community and shall provide a fair hearing to any claimant to membership aggrieved by the omission or deletion of his name from such roll.

APPENDIX D

Article III—Membership

Amended Constitution and By Laws of the Hualapai Tribe of the Hualapai Reservation, Arizona, Approved October 22, 1955.

Section 1. The membership of the Hualapai Tribe shall consist of:

(a) All persons who are members of the Tribe on the date when this revised Constitution is finally approved.

(b) Any child of one-fourth degree or more of Hualapai Indian blood who is born to a resident member after the date this Constitution is approved, and any child of one-fourth degree or more of Hualapai Indian blood born to a non-resident member, after the date this Constitution is approved, provided that a declaration of intention to maintain membership of such non-resident child is submitted to the Hualapai Tribal Council within one year from the date of birth of such child. The method of declaring intention of membership shall be determined by ordinance of the Council.

Section 2. The Council shall have the power to pass ordinances, subject to review by the Secretary of the Interior or his authorized representative, governing future membership, loss of membership, and the adoption of members by the Hualapai Tribe.

APPENDIX E

Article IV—Members

Constitution and By Laws of the Confederated Tribes of the Umatilla Reservation in Oregon, Approved December 7, 1949.

The membership of the Confederated Tribes shall consist, as follows, of:

(a) All persons of Indian blood whose names appear on the official census roll of the Confederated Tribes as of July 1, 1949; provided, that corrections may be made in said roll by the General Council within five (5) years from the adoption and approval of this Constitution and By-laws, subject to the approval of the Secretary of the Interior or his authorized representative.

(b) All children born to enrollees of the Confederated Tribes, who are of at least one-fourth (1/4) degree of blood of the Confederated Tribes. Where only one parent of such children is an enrollee of the Confederated Tribes, the children may become members only upon application accepted by the General Council.

(c) Any other person of blood of the Confederated Tribes may, upon application, be admitted by a majority vote of the General Council to participate in tribal government and to vote and to hold office. It is extremely understood, however, that such persons shall not participate in any right or claim arising out of treaties to which the Confederated Tribes are a party.

APPENDIX F

Affidavit

STATE OF NEW MEXICO }
COUNTY OF SANTA FE } ss:

JAMES R. MARTINEZ, of lawful age, upon being duly sworn on his oath, states:

1. He is the Governor of the Pueblo of San Ildefonso, an Indian Tribe. He has been Governor of said Pueblo since his inauguration into office in January, 1975.

2. Attached to this affidavit is a true copy of the Ordinance of the Pueblo of San Ildefonso, dated August 26, 1975, whereby female members who marry non-members are required to leave the Pueblo, but male members who marry non-members do not have the same restrictions. This also provides that Indians who are not members may apply for membership.

3. The Ordinance dated August 26, 1975 is a codification of the traditional practices of the Pueblo of San Ildefonso, based on Tribal custom and religious practice. The basis of this custom and religious practice is:

The San Ildefonso Pueblo government has a traditional and religious basis. The men are the backbone of the religion and, therefore, the men run the government.

The method of selecting the Government is quite simple. The religious leaders of the various religious fraternities get together and go over the names of those men whom the religious leaders think will make good officials. In the old days, they met in the Kivas but now the meetings are usually held in the Head man's house. The selection involves a series of meetings and the result is a unanimous agreement among the religious leaders of the two or three men who would make the best Governor and Lieutenant Governor. Then lesser religious leaders add to these names

to fill out the Council. There is always unanimous agreement before the names are arrived at. These names are submitted to the male membership who always ratify the selections because they respect the opinion of the religious leaders. They only real choice before the male membership is who is going to be Governor between the two or three men named by the religious leaders. The Governor is selected by unanimous choice after consideration of those men selected by the religious leaders. The nominees not selected as Governor are always made members of the Council.

Non-Indians or other outsiders, such as an Indian from another Tribe who is not a member, are never allowed to participate in this kind of selection. In particular, the presence of a non-Indian would be a bad influence because of the non-Indian just would not think the same way as an Indian and would not give the same consideration to the naming of the officials.

The officials also do not want non-Indian men present in the Pueblo. There are several reasons for this, all based on a fear of non-Indian influence in the Pueblo. First, non-Indian men might pry into the secret religious aspects of Pueblo culture and try to change it or, perhaps, destroy it. Also, non-Indians will try to avoid performance of the community obligations required of all male members. Lastly, our experience is that the non-Indians who want to marry Pueblo women and move into the Pueblo are usually men looking for a way out of paying property taxes on their land.

The matter of community obligations is extremely important. These community obligations have a religious basis and all men are required to perform them. If a man does not perform them, the religion is violated because the religious rule is that all must perform. These duties are performed at various times during the year, not just on feast days. The concept is that all must pull their own weight and if one man does not perform his duties, he simply is not

pulling his weight. The performance of these duties is, therefore, the obligation given in exchange for the privilege of being a part of the Pueblo culture.

There have been a small number of cases in the past where Pueblo men have tried to avoid their community obligations. Each time, the man has been brought before the Principals and the duties and the necessity of performing these duties were explained to him. If he still refuses to perform these obligations, he must leave the Pueblo.

The women have certain obligations too, but these are really not of a basic religious nature. The women are in charge of taking care of the house and, therefore, the women's obligations are such things as cooking and other domestic chores to support the men as the men perform their obligations. The women's obligations can be performed by outsiders without really interfering with the religious functions and obligations performed by the men.

The religion of the Pueblo is based on unity, that things are done communally, as a group. If one person breaks the unity, the basis of the action is broken and is, therefore, done in violation of the religion.

JAMES R. MARTINEZ, *Governor*

(Subscription Omitted in Printing)

APPENDIX G

Ordinance Governing Residence Status of Female Members Who Marry Non-Members.

THIS ORDINANCE, duly enacted this 26th day of March, 1975, by the Council of the Pueblo of San Ildefonso, an Indian Tribe.

WHEREAS, the Pueblo of San Ildefonso is experiencing a serious problem of having persons, both Indian and non-Indian, who are not members of the Pueblo residing on the Pueblo lands because such persons are married to members; and

WHEREAS, it has long been the custom and tradition of the Pueblo to recognize that male members of the Pueblo may reside on the Pueblo lands with their non-member spouses, and families, that female members who marry non-members must not maintain a residence on the lands of the Pueblo; and

WHEREAS, the ordinances of the Pueblo of San Ildefonso dated January 11, 1965 and March 24, 1965, regarding membership in the Pueblo and interests in land in the Pueblo, respectively do not specifically set forth the residential status of female members of the Pueblo who marry non-members; and

WHEREAS, the Council of the Pueblo of San Ildefonso wishes by this ordinance, to clarify the residential status of female members married to non-members who reside on the Pueblo of San Ildefonso lands;

NOW, THEREFORE, IT IS ENACTED AND ORDAINED AS FOLLOWS:

1. *Definitions*

   (a) "Indian" means any person who has not less than one-fourth Indian blood.

   (b) "Non-Indian" means any person who has less than one-fourth Indian blood.

   (c) "Member" means any person duly recognized as a member of the Pueblo of San Ildefonso.

(d) "Non-Member" means any person who is not a duly recognized member of the Pueblo of San Ildefonso, whether such person is an Indian or Non-Indian.

(e) "Pueblo of San Ildefonso lands" means any lands owned by the Pueblo of San Ildefonso or held in trust for the Pueblo of San Ildefonso by the United States.

(f) "Residence" or "residing" means the establishment of a permanent home, including a trailer or mobile home, on the Pueblo of San Ildefonso lands. It shall be presumed that living in such a home for more than 30 days shall be the establishment of a permanent home.

2. No female member of the Pueblo of San Ildefonso who is married to a non-member shall be allowed to establish a residence on the Pueblo of San Ildefonso lands. All female members married to non-members who have heretofore established a residence on such lands shall remove themselves and their immediate families from such lands within 90 days from the effective date of this Ordinance. Such time may be extended by written consent of the Council for good cause shown.

3. Nothing herein shall abrogate any rights of any Indian to membership in the Pueblo of San Ildefonso pursuant to the membership ordinance dated January 11, 1965, or any amendment thereto.

4. Nothing herein shall abrogate any inheritance rights set forth in the ordinance of March 24, 1965, or any amendment thereto, provided, however, that no interest in Pueblo of San Ildefonso lands shall ever be sold, transferred or devised to any person not a member of the Pueblo nor shall any interest in such lands be inherited by any person not a member of the Pueblo.

5. In the event a female member of the Pueblo marries an Indian, and they desire to reside on Pueblo of San Ildefonso lands, the male non-member spouse who is an Indian may apply to the Council for membership in the Pueblo. Such application for membership shall be governed by the provisions of the Ordinance of January 11, 1965 or any amendment thereto.

6. In the event the provisions of this Ordinance conflict with any provisions of the Ordinance of January 11, 1965 or the Ordinance of March 24, 1965, this Ordinance shall control and supersede the provisions of said Ordinances.

7. If any portion of this ordinance or the effect thereof as to any person or situation is held invalid, such invalidity shall not affect the validity of the remaining portions of this ordinance or the effect thereof as to all other persons or situations, and to this end the provisions of this ordinance are severable.

8. This Ordinance shall be effective when ratified at a Council meeting of the Pueblo.

/s/ James R. Martinez
Governor

/s/ Martin Aguilar
Lieutenant Governor

Attest:

/s/ Douglas A. Trigil
Secretary

Council Members:

/s/ Louis Naranjo, Jr.
/s/ Robert P. Sigeles
/s/ Dennis P. Martinez
/s/ D. S. Martinez
/s/ Gilbert Atencio
/s/ Jacundo Sanchez
/s/ George Martinez
/s/ Tony E. Glenoir
/s/ Epifanio Pena

APPENDIX H

Affidavit

STATE OF NEW MEXICO
COUNTY OF SANDOVAL } ss.

JERRY QUINTANA, of lawful age, upon being duly sworn on his oath, states:

1. He is the Governor of the Pueblo de Cochiti, an Indian Tribe. He has been Governor since his inauguration into office in January, 1976.

2. The government of the Pueblo de Cochiti is based on tradition and religion. The men of the Pueblo are the backbone of the religion. Consequently, the men run the Government, which is, largely, selected by the religious leaders. Women have no voice in the selection of the government nor are they members of the Council.

The Council at the Pueblo de Cochiti consists of all those men who have ever held high office in the Pueblo. Once a man is selected for high office, such as Governor, he automatically becomes a member of the Council, for the remainder of his life. Each year, a selection is made for the office of Governor. The person selected may be a man already on the Council, who has held office in previous years or it may be a man who has never held office but in whom trust is reposed. The selection is made by our two religious leaders, the Cacique and his assistant. These two men are not on the Council and never hold secular office. The selection is ratified by the adult men of the Pueblo at meetings held in our Kivas. At no time is the selection made by the Cacique and his assistant ever questioned. The man selected for Governor cannot and does not refuse office.

A non-Indian or an Indian from another tribe are never allowed to participate in any way with the Tribal government or the process of selection of the Governor.

The Council also does not want non-Indian men or Indians from outside the Pueblos to live at the Pueblo. There are several reasons for this. We fear that non-Indians might try to have us give up our traditional religion or to damage it some way. More importantly, we fear, based on past experience, that the non-Indians or outside Indians such as Navajos will try to avoid performance of community obligations required of all male members. And we do not want our Pueblo to become a haven for men from the outside who do not want to pay property taxes.

All men within the Pueblo are required to perform certain community obligations, which have a religious basis. If a man does not perform these obligations, our religion is violated because it is our rule that all men are required to perform. We believe that all men in the Pueblo must do his share in the community and, therefore, doing one's share in an obligation which is in exchange for the privilege of being part of the Pueblo.

No man in the Pueblo ever questions whether he must perform his community obligations. It is understood that while a man and his family are free to leave the Pueblo at any time to live on the outside, he must perform his obligations if he continues to live in the Pueblo.

The women of the Pueblo also have certain obligations but these obligations are not of a basic religious nature and are to support the men. These obligations can be performed by outsiders without any real disruption of the religious functions of men or the community obligations of men. Therefore, we do not have any strong feeling about men from the Pueblo bringing in wives from the outside.

I have read the affidavit of Governor James R. Martinez of San Ildefonso Pueblo, and I have read the San Ildefonso Pueblo Ordinance of August 26, 1975. The Pueblo de Cochiti does not have any written ordinance concerning residence on the Pueblo. However, the traditional rule of

Cohiti has been that a women who marries an outsider must move out of the Pueblo while a Cochiti man who marries an outsider may bring his wife into the Pueblo to live with him. We have this rule and enforce it because we cannot have men from the outside in our Pueblo traditions and religion.

/s/ JERRY QUINTANA
Jerry Quintana

(Subscription Omitted in Printing)

APPENDIX I

Affidavit

STATE OF NEW MEXICO
COUNTY OF SANDOVAL } ss.

RONALD E. JOHNSON, of lawful age, upon being duly sworn on his oath, states:

1. He is the Governor of the Pueblo of Laguna, an Indian Tribe. Te has been Governor of said Tribe since his inauguration into office in January, 1975.

2. The Pueblo of Laguna is organized under Section 16 of the Act of Congress of June 18, 1934 (48 Stat. 987), with its basic governmental document being the Amended Constitution and By Laws of Laguna Pueblo, approved by the Secretary of the Interior on November 10, 1956.

3. Attached to this affidavit is a true copy of Article II of the said Amended Constitution and By Laws, which set forth the membership standards and qualifications of the Pueblo of Laguna.

4. The provisions of Article II, Section 1(d)(1) and (2) which exclude from membership certain children of Laguna fathers and non-Laguna mothers were included in the Amended Constitution as a reiteration and codification of existing Laguna custom. The Laguna Council in its consideration of the 1958 Amended Constitution wanted to make sure that persons entitled to membership were reared in a setting which exposed them to the influence of the Pueblo. The illegitimate child of a Laguna father and a non-Laguna mother will most likely not have any contact with the Pueblo, because such child would, in most cases, be living off the reservation. The problem was acute in 1958 and still is, because of a large number of Laguna men have served in the Armed Forces of the United States, in World War II, the Korean conflict, the Vietnam Conflict and at times between and after such conflicts and have fathered children by women who are non-Lagunas.

ROLAND E. JOHNSON, *Governor*

(Subscription Omitted in Printing)

APPENDIX J

Affidavit

STATE OF NEW MEXICO }
COUNTY OF TAOS } ss.

JUAN DE JESUS ROMERO, being first duly sworn, states:

1. I am the Cacique of the Pueblo of Taos, the senior official of the General Council of the Pueblo, as well as the principal religious leader. I was Governor for several terms before I became Cacique nearly twenty years ago. My religious training for community service began in the traditional way, when I was a youth, and continued regularly from that time on.

2. The unwritten traditions, customs and laws by which Taos Pueblo has been governed from time immemorial are based in the religion of the Pueblo, which in turn pervades and safeguards all aspects of the community's life and shapes and sustains the individual members thereof. For this reason, the execution of high public office requires a thorough knowledge of the religion, which can only be gained by a lifetime of training and participation. Such training is intensive and rigorous, starting in early adolescence, and has always necessarily been restricted to male members. Taos Pueblo has been subject to three different sovereign nations since the sixteenth century and to vigorous efforts to suppress its religion, the latest in the 1920's and 30's. Nevertheless, the religious societies of the Pueblo to this day continue regular six-to-eighteen month religious training programs for young boys, who are excused from school attendance during their first intensive training period. Thereafter, training continues at prescribed intervals, regular participation is expected, and no man is considered sufficiently prepared for public office until he has fulfilled these obligations for more than a decade. Eligibility for the highest offices and for service on the General Council is not reached until much later in life, after many more years of preparation.

3. Although not every male member elects to pursue the intensive training required for high public and religious office, varying degrees of such training are made available and expected of all men in the Pueblo to prepare them for other vital religious and community service functions. Their regular participation in the ceremonial and religious life of the Pueblo is thus essential to the community, the preservation of its culture, and the survival of its recognized traditional form of self-government.

4. All members of the Pueblo, whether male or female, are by tradition members for life regardless of their marital status (unless membership is voluntarily relinquished or superseded by enrollment in another tribe). The right to membership, however, naturally derives from male members, who bear the responsibility for the continuity of Pueblo community and its government. The training of female members does not prepare them for this responsibility. Because of his religious training, a male member who marries a non-member can ensure continuity through his children, but a female member who marries a non-member cannot. The children of female members of other tribes are members of their fathers' tribes, and thus cannot also be members of Taos Pueblo. Such children, as well as the children of female members who marry non-Indians, are the responsibility of their fathers, who have no knowledge of the unique culture of Taos Pueblo, and who cannot under any circumstances be absorbed into the Pueblo's religious life. Children who lose the guardianship of their non-member fathers, however, or illegitimate children, may become eligible for membership if they are adopted in early childhood by (or are wards of) a related head of family who is a Pueblo member and who accepts responsibility for their upbringing.

/s/ JUAN DE JESUS ROMERO
Cacique

(SUBSCRIPTION OMITTED IN PRINTING)

APPENDIX K

The Pueblo Social Organization as Basis for Rules of Tribal Membership

FLORENCE HAWLEY ELLIS
Prof. Emeritus of Anthropology
UNM

"If the social structure is a network of relations binding the individuals of a social group together for certain purposes, then social structures may differ in the number of individuals bound together and in the character and complexity of the ties uniting them with one another." Eggan 1950:6.

The problem which has arisen from the decision of the Tenth Circuit in *Martinez* v. *Santa Clara* has raised serious concern among the other Indian Pueblos. The basis of their concern is two-fold. The first is that their native tribal governments, a separate set of leaders and council for each pueblo, will be stripped of the power to control their own people. Such a situation would be the forerunner to complete breakdown of tribal autonomy and power for unity or for action; it foreshadows the confusion and cultural collapse witnessed in such Indian groups as the Sioux. The second is the breakdown which would be imposed on the type of social organization specific to an individual pueblo when its rules of membership are tossed to the winds, for those rules are part of a social system which is all pervasive because it stems directly out of that specific group's concepts of kinship. Because of the depth of its importance, we shall take up this second matter first. We shall begin with some general statements which are necessary to understanding of the Pueblos as cultural groups.

Introduction: The Pueblos exist and always have existed as a number of separate tribes. Their languages fall into four different stocks. The Hopi of the west (northern Arizona) speak Hopic, distantly related to the language of the

non-Pueblo Shoshoneans, their neighbors to the north. Neither Hopic nor any of the other Pueblo languages are related to Zunian, the language of the Zunis who originally lived in numerous pueblos but finally have concentrated in one pueblo plus farm villages. To the east of Zuni are the pueblos which speak Keresan: Acoma, Laguna, San Felipe, Santo Domingo, and Cochiti. Keresan is not related to any of the other Pueblo languages, nor, is anyone certain of its being related to any language spoken elsewhere. The other Pueblo family of languages is Tanoan, of which there are three branches, Tiwa, Tewa, and Towa. The Tewa live north of Santa Fe; Santa Clara and San Ildefonso fall into this group, but there also are San Juan, Tesuque, Pojoaque, and Nambé, and in the past there were others. Four Tiwa villages remain today, Taos and Picuris as the two most northern pueblos, and Sandia and Isleta, the one north and other south of Albuquerque. Jemez is the remaining Towa pueblo. It is immediately apparent from this linguistic separation that far in the past peoples of different origins settled in the Southwest. Here they faced the problem of adjusting their way of life to the environment, an external adjustment to the local ecology which, broadly speaking, follows one pattern. In the west (eastern Arizona and western New Mexico) these people lived upon a high plateau divided by mesas, canyons, and rivers or washes more often dry than not. Precipitation was low and, coming primarily in summer thunderstorms with accompanying run off, made dry farming hazardous. As partial compensation, Zuni and other pueblos farther to the east developed relatively small irrigation systems even before the Spaniards arrived in 1540, but constant streams from which water could be taken were few. From Laguna eastward, river water was more available, though still far from dependable. After 1540 the pueblos, with villages greater in number than today, were almost entirely located in valleys, farming largely, but not entirely, by ditch irrigation. The people lived in compact communities

in which abode or stone homes were built contiguously and above each other to form blocks or apartment houses up to 4 or 5 stories in height. In summer, many families moved to small structures near their farms. Kivas and ceremonial rooms used by the numerous religious societies were located in the plazas and/or house blocks. Hunting and gathering supplemented the irrigated agriculture. Pottery, baskets, and woven fabrics were made and used by all though some specialization in these lines permitted trade. As Eggan, one of the major social anthropologists of this generation, states:

> "For the Pueblo area, itself, it may be said that in material culture, on the one hand and in the ideas, beliefs, and sentiments, on the other, there is a remarkable unity. Each village has achieved a social integration which has been strong enough to keep the society from disintegration, if not from change. That these results have been reached through varying types of social organization is important for theoretical purposes."

These varying types of social organization, which Eggan and other anthropologists spent years untangling, have been found to derive directly from the specific type of kinship system fundamental to each linguistic group. In other words, the type of thinking which is found in the kinship grouping (*varying from linguistic family to linguistic family and appreciably different from that of our own thinking and kinship grouping*) is basic to type of social organization within each pueblo. This includes the concepts regarding rules of membership within each pueblo tribe. The tribe, of course, is thought of rather as an enlarged family. We do the same in thinking of citizens of the United States making up one "family" which acts together through its government and thinks together through its mores. However, much more flexibility and individual variation is permitted and expected in a large nation than for a small tribe because the small unit which is not conservative quickly loses its identity and ceases to exist. This is precisely what is feared by the Pueblos, who have long stressed conservatism and have managed to hold themselves together and to maintain their people in a state of much greater psychological equilibrium and economic stability during periods of exaggerated rates of change than almost any other Indian people of the United States. It is, therefore, of great importance to understand the kinship system and social structure of a people whose regulations for tribal membership are under attack, for these matters reflect the fundamental manner of thinking, the philosophy, of that tribe.

As background to such a study, which we can go into but briefly in a paper, we need to digest some of the accepted concepts used in studies of social organization. Some quotes from the introduction Eggan gives for his classic on Pueblo social organization are in order:

> A society is a group of individuals who have adjusted their interests sufficiently to cooperate in satisfying their various needs. Culture is the set of conventional attitudes and behavior patterns by which the mutual adaption and cooperation is carried out. On the human level, a society cannot exist without culture, nor a culture without the individuals of a social group.
>
> . . . The units of social behavior in any society are the social usages—behavior patterns expectable between different individuals or groups under given conditions. . . . The units of social structure in any society are the social relations which develop through the recurring expression in behavior or social usages. Conventional behavior between individuals or groups establishes social relations which develop through the recurring expression in behavior of social usages. Conventional behavior between individuals or groups establishes social relations which may be abstracted from the behavior in which they are imbedded and, for certain purposes, treated separately. . . . Institutions . . . are composed of individuals organized in a social structure with a set of attitudes and behavior pat-

terns through which the structure is exemplified and the institutional ends are achieved,

> . . . it is necessary to utilize various criteria as indexes of social structure. Some of these are limiting factors: the size of the social group, the density of its population, and the territorial arrangement. More important as indexes are various subdivisions of the social structure, the sex and age divisions, the kinship system, and the various formal and informal organizations which the group may take. . . . *the kinship system has proved, in many cases, to be the most useful index of social structure. In many societies, the kinship system represents practically the entire social structure, and, even when there are laborate developments of segmentary and associational structures, these are frequently closely associated with the kinship system. In some types of social structure (our own example) kinship plays a much less important role.* (Underlining ours)

The kinship system consists of socially recognized relations between individuals who are genealogically and affinally connected, plus the set of social usages which normally prevails among them. These relations originate in the domestic family but are largely socially determined. Between each pair of relatives there are rights and duties which define their relation; these relations are usually organized in such a way that they are consistent with one another and result in a minimum of conflict under ordinary circumstances. *In many societies these relationships, and the corresponding behavior patterns, are widely extended, making the kinship system coterminous in effect with the tribe.* (Underlining ours)

Kinship terms are part of the social usages but also symbolize the character of the relationships between relatives. Kinship terminology represents one means of organizing relations between kindred and for extending these for social purposes. From this standpoint the emphasis on terms of relationship as strictly linguistic phenomena is not warranted. Since, however, there is usually a fairly close correlation between the terminology and the social behavior of relatives, in

the absence of information concerning social usages, some insight into the kinship system may be obtained by a study of the way in which relatives are classified terminologically.

By the analysis and comparison of various kinship systems a limited number of structural principles have been worked out which derive from the relations existing in the elementary family. Such principles as the "equivalence of siblings," the "differentiation of sex," the "relationship of generations," the "unity of the lineage group," and others have been defined. These principles, representing descriptive summaries of social relations and social behavior, are found in varying proportions and arrangements in different systems, and in other aspects of the social structure as well, and thus offer a basis for preliminary comparison and classification. Since such principles often lie behind diverse institutions, they may suggest explanations of particular correlated features. (Eggan 1950:4-5, 9, 10-11)

The old position of Kroeber, that kinship nomenclature is largely explainable in terms of linguistics rather than representative of sociological factors has been largely superceded by that of Lowie, Sapir, Gifford, Lesser, Eggan, and others. Lowie's (1929) study of the kinship system and clan organization among the Hopi or First and Second Mesa is our first example:

> Relationship terms are studied by the Anthropologists not merely as so many words inviting philological analysis and comparison, but as correlates of social custom. Broadly speaking, the use of a specific kinship designation, e.g. for the maternal as distinguished from the paternal uncle, indicates that the former receives differential treatment at the hands of his nieces and nephews. Further, if a term of this sort embraces a number of individuals, the probability is that the speaker is linked to all of them by the same set of mutual duties and claims, though their intensity may vary with the closeness of the relationship. *Sometimes the very essence of social fabric may be demonstrably con-*

> *nected with the mode of classifying kin. Thus kinship nomenclature becomes one of the most important topics of social organization.* (Lowie 1929:84. Underlining ours.)

We might apologize for this lengthy background, but for those not working primarily in this field, a resumé of the most important concepts which provide a context within which we shall couch our specific study is necessary for understanding.

We now look into the Tewa Pueblo system of kinship and social organization.

Pueblo Basics: None of the Pueblo systems parallel our own, and it is an error in judgment to attempt understanding or evaluation of the Pueblo system in terms of ours. The parts should be understood in terms of the whole. No system of social organization works perfectly but those which exist today have aided the ancestors of our Indians in surviving droughts, crop failures, and subsequent moves to seek new areas for homes and farms. These systems survived through the stress of competition with other Pueblos for arable lands through centuries of increasing dryness and then through the attacks by Spaniards and by Plains Indians, and finally in the struggle for adjustment to the world of today, the necessity for some formal education, wage jobs, and constant wariness against those who would find means to take from the people some of their lands and other resources.

In truth, the Tewa concept of family and social organization is more like our own than the systems emphasizing unilateral lineage as found in Hopi, Zuni, and among the Keres. The Tewa system can be categorized as bilateral, but with emphasis on the patrilineal side, as clearly stated by anthropologist Alfonso Ortiz, a member of San Juan Pueblo. This seems to have been the original system throughout the Tewa pueblos of the past, though it was

considerably disrupted by factionalism spurred by acculturation which has torn at the vitals of SanIldefonso and Santa Clara since 1894, or earlier.

Tewa kinship terminology makes no distinction between relatives on mother's side from those on father's, nor is there any differentiation in terms used for male and for female relatives in the same category of relationship to the speaker. Where one does find terminological differences is in relation to age: older relatives are accorded a different term and more respect than younger kin of the same type and degree of relationship.

The Tewa family is a nucleus consisting of man, wife and children, and it is the privilege of this unit to choose its closest affiliation as with the family of either the man or his wife. Such affiliations more commonly are on the man's than on the wife's side, perhaps because of the work group and land inheritance. Land may be passed down to a son or a daughter, but in the past sons commonly remained with parents to aid with farm labor. Today, mutual assistance patterns persist, even though wage work has, to a certain extent, superceded agricultural production. Changes in household affiliation or the beginning of a new household may arise from changes in factional affiliation or the creation of a new faction. The head of the family is an older male with leadership qualities, "and the members of his household are loyal to the views and sentiments of the faction with which he is aligned." (Dozier 1966: 172-173). The only exception seems to be that if there is no older male to fit into this position, the oldest female could be considered to stand as head of the family. The *Martinez* case decision of the Tenth Circuit comes to the conclusion that Santa Clara has discriminated against women. While this conclusion might have some merit from an Anglo point of view, it does not present an accurate picture of the status of women in the Pueblos. The female has always

held a social position more nearly equal to that of the male than in our society. This equality quite certainly stems from the fact that while men were the hunters, women were the gatherers, and while men handled the agriculture, women not only did gardening but were considered to own and be responsible for foods after they had been brought in from the fields. Women and men both worked at construction. Women and men each owned the craft work they produced and could use it in trade. Pueblo women were economically equal to the men and hence social equals, though specialization accorded to each sex certain responsibilities and privileges.

Beyond the household in the Tewa system is the moiety. The two moiety organizations found in every Tewa village are known respectively as the Summer and the Winter People. The concept of dualism is very important in Tewa thought (Ortiz 1969; Dozier 1970). If the native refers to his moiety group as his "clan" (as is more common than not among the Tewa), the misnomer stems from their having borrowed, without clear understanding, this term from questioning anthropologists who came their way in the late 19th century. In the Tewa system the Winter moiety technically is in charge of a pueblo during the winter season, their responsibilities concentrating on rituals for the winter solstice which opened the old native calendar and also on ceremonial activities concerned with hunting. Hunting, largely done in winter, was more important to the Tewa and to the Tiwa neighbors in Taos and Picuris than to the more southern pueblos because (1) the northern area was too chilly to produce cotton in any quantity, and (2) keeping a supply of clothing and other articles of tanned buckskin as well as of dried meat necessitated serious pursuit of the chase. The rituals and dances of the Winter People were intended to encourage increase of food animals and to insure hunters' luck. The Summer moiety, in its turn, is responsible for rituals and dances pertaining to summer

growth, especially of crops. Each moiety has (or had) its own cacique or leading officer, together with aides and lesser officials. During his first year every child is initiated into one of the two moieties, customarily that of his father unless his father is unknown. The child is given a moiety-specific name for use should he later represent the moiety supernatural in rituals or become a member of the important moiety society, the small priesthood containing the cacique or chief priest and a small body of men who work with him. A second moiety initiation is given the child between his 6th and 10th year, followed by a third, known a the "finishing," when he is 10 or older. This seems to have been the generally-held old Tewa system, but in San Juan it has suffered some modifications. San Juan Pueblo housed the first Spanish capital of New Mexico, from 1598 to 1610 and, from that time until the present time, villagers of Spanish descent have been close neighbors and the source of numerous spouses and much outside influence. As Ortiz says "... the process of recruitment into moieties seems to be partilineal. . .", but in San Juan a relative sometimes will request that one child of a family go into the moiety opposite to that of parents and the other siblings. Such a request is granted. Influence from the outside also has changed San Juan's rules of marriage so that the only prohibition is that imposed by the Catholic church: persons closer than fourth cousins in relationship may not marry. In San Ildefonso and San Juan the old system of moiety endogamy is enforced in that a woman who marries a man of the opposite moiety customarily goes through a new initiation and so moves into her husband's moiety. The family group as such thus forms a group within the big moiety. In Santa Clara the custom of moiety endogamy is common but not enforced for, as I have been told positively by Santa Clara people, it is impossible to change one's moiety. In common practice children almost always go into the moiety of father. The responsibilities and loyalties of

an individual belong to the moiety of his initiation, and moiety unity in thought and action are the strongest force in a Tewa pueblo.

The farm areas of the pueblo are divided into those of the Summer and those of the Winter People. Social and economic cooperation thus fall within the same large pool of moiety personnel as one's major ceremonial cooperation. Ortiz (1969:10) comments that "most of Tewa thought and action is organized according to the moiety division..." Although earlier anthropologists have suggested that the Tewa once may have had clans, detailed studies have proved this hypothesis incorrect. As far as can be seen the unilateral lineage never was a matter of importance to the Tewa. Instead, as Dozier makes clear (1970:165), emphasis has been on the moiety, which is overwhelmingly though not necessarily patrilineal in membership. It is easy to see how such a balanced system as that of the moieties could be thrown out of balance through jealousy or one group blaming the other for misfortunes befalling the tribe. Certainly native polarization of opinion on such issues as conservatism as opposed to what is considered to be "progress" has led to splits, even with the threat or reality of one group leading the pueblo. Two factors have largely prevented such a final dispersal. One is the loss of individual holdings of family-owned homes within the pueblo, even were new lands available elsewhere. The other is the fact that lifetime membership in the various religious societies or sodalities within a Tewa pueblo crosscuts moiety membership.

We can summarize what we have been saying by turning our discussion from the social organization, as such, to the individual, as such, and asking how a young Tewa would see himself in terms of identity:

> I am member of the — household, which is under the leadership of my father's father or his oldest brother,

> whose name we carry. I am a member of the — moiety, which is my father's. (A child born out of wedlock and with father untraceable necessarily goes into mother's moiety). My farm is on land belonging to that moiety, and our closest friends belong to it. I am a member of — Pueblo.

In actuality, his membership in the tribe, as customarily in his household and almost invariably in this moiety with its ceremonial, economic, and socio-political functions, comes through his father. This is the traditional Tewa system.

If inter-tribal or inter-racial marriage has not occurred, his tribe is that of mother as well as of father. The point of not marrying outside one's tribe and village was generally stressed by older people to the younger. I well recall long discussions of this when mothers fearfully hoped that neither their sons nor their daughters would take a mate from outside the pueblo. Marrying a member of a non-Pueblo tribe or a non-Indian was successively worse as a fate. It was considered good to go away to school to learn English and have good food and become fat, but it was also dangerous because it might lead to marriage to an outsider. Should this occur in spite of admonitions — and such occasions still were relatively rare at that time — the expectation of the Rio Grande Pueblos was that an all-Pueblo couple would live in the village to which the man belonged. A Pueblo man marrying a Spanish American woman brought her home to the village but might be required to build a house on the outskirts so that she would not witness secret ceremonial activities. Some exceptations must be admitted to the system of an Indian male taking his wife to his home. For instance, I know of two Hopi men who married Rio Grande Pueblo girls and remained in their wives' pueblos. Among the Hopi, the concept of matrilocal residence always has been strong; these men would have had no home whatsoever to take their wives into. Other problems undoubtedly created other exceptions, but occasional

exceptions do not negate a system. A mixed couple in which the man was Spanish American or Anglo usually lived in town or on a ranch; he often was tied to a job and his Indian wife looked forward to a life different from that in her pueblo. The cultural and personal dominance factor characteristic of a Spanish American male rarely would have tolerated any arrangement other than taking the bride to *his* home. Spanish Americans and the ancestral Spanish mixed a good deal of their blood with that of the Pueblos.

Needless to say, the long close contacts between the Tewa "with patrilineal tendencies" and the definitely patrilineal Spanish gave each a chance to recognize his own system in that of the other. Further, Anglos (the term used locally for all non-Indians and non-Spanish Americans) were pushing into the Tewa area after 1847-8. They were competitors for land and water. They carried power and prestige, little as the Pueblos and Spanish Americans cared to recognize it. A few of these, like the Spanish speakers, married Pueblo women. One whose history we know was the school teacher and trader, Thomas Dozier, father of Edward Dozier (anthropologist). He married a Santa Clara woman, lived in the pueblo, and cooperated in native community work. Even today he is recalled with respect and liking, and he must have exerted a great deal of influence on his wife's extended family and friends. So had the local churchmen, from early days to the present, who set down their baptismal records in terms of the surname of the father of a baptised child. In the 19th and 20th century there was added the none-too-casual influence of school teachers, physicians, nurses, and all the other non-Indians who stressed the use of *father's* name and ethnic membership in every day dealings with Indians. Our own society, in functional fact, is very patrilineally oriented. This use of father's surname, however, is closely paralleled in the use of a surname, usually that of the patrilineal side,

in designating the bilateral groups of kin which made up the household in Tewa system. This was the unit which the early anthropologists had seen but neither accurately nor clearly—man, wife, their unmarried children, and usually married sons and their wives and children, all grouped under the name which those anthropologists hesitantly set down as a probable-clan-name. In daily life the Pueblos went by their first names, as is usual today.

Although the patrilineal concept was not foreign, acculturation influences as such left a heavy residue of stress. It is generally thought after observation of a pronounced tendency toward factionalism in pueblos of the historic period, that one of the several possible explanations for the number of prehistoric ruins found in the Southwest may have been some budding off as the result of lengthy contentions. Ideally, the Pueblo people "keep a good heart" and cooperate with each other for the benefit of all. In reality, altercations which carry bitterness through years are far from uncommon, and "dirty linen" not infrequently is washed in public. Shouting matches can occur in a council meeting, invectives in a court room, and accusations of witchcraft or, more modernly, of various petty or larger wrongdoings at home. In other words, Pueblo people are not far different from ourselves. Among the Tewa, moiety organizations characteristically were competitive and tended to be somewhat jealous of each other. As far back as the 1880's (see Bandelier's papers: 1890:301), one moiety of a pueblo commonly tended to be progressive and the other conservative. Acculturation reinforced both of these tendencies. Through most of the 19th and early 20th centuries (Dozier 1966) a number of "progressive Santa Clara families" who opposed the dictates of Pueblo authorities "formed a core within the more 'progressively' oriented Winter moiety," objecting to a number of the old cumpulsory rules. In 1894 the canes of authority (staves of office) had come into the hands of those who called them-

selves the Conservatives, almost the entire Summor moiety plus a handful of Winter men, primarily the few at that period holding secular offices in that pueblo's government. This group saw their opportunity and appealed to the Indian Agency in Santa Fe to recognize their group, per se, as the *de facto* governing body of Santa Clara. The BIA, none too well informed in Pueblo culture and seeing whatever they saw rather from the surface, accepted the proposition, so Summer People ran Santa Clara's government on their own. The Winter People talked of secession. The Summer People suggested that Winter be expelled. One or the other might have happened except for the fact that no free land was available for refugee occupation.

The Winter Progressives finally decided that they would continue to live in the pueblo, but they would not be of it. They refused to participate in the community's religious dances or watch the Conservatives do their dancing. The Progressives would not take part in any ceremonies or attend the governor's council. They refused even to obey the orders of Pueblo officers where that seemed possible with relative impunity. From 1895 to 1935 the Summer moiety appointed all the important secular officers of Santa Clara and did what it could in carrying on the old once-cooperative ceremonies important to that pueblo. The Winter Progressives blamed the Summer People for the break in pueblo unity and hence laid on their head the responsibility for crop failures, illness, etc., all believed by Pueblo people to result from getting out of step with nature through improper behavior. Winter members of the two curing societies withdrew from their technically life-long membership, leaving only Summer People as members. Other local sodalities fared similarly. The Winter People in truth had seceded, even if they could not move away.

The main point to note here is that as the Summer and Winter People were patrilineal groups, with rare exceptions in membership, their alignment in this split was via father's side and the withdrawal to build a new pueblo town, had it occurred in complete fact, would have been on patrilineal alignment. Although moiety membership, like everything in the old Pueblo system of thought, was conceived primarily as a religious matter, the moiety existed as a closely integrated party with secular as well as religious concerns. Each had handled government of the pueblo for a half year in the past; now each was totally governing its own people for the full year. As one might expect, in time it was recognized that within each of the two units, there actually was some division into its own Progressives and Conservatives. One may think of this as merely making a total of four divisions to the tribe, but what really had happened was that two new tribes which we should call Santa Clara A and B had come into existence, each its own conservative and progressive moieties, though both tribes still occupied one village.

By 1934-35, Santa Clara was well aware of its debacle. A survey indicated that the big majority of persons within the pueblo, unhappy, resentful, and puzzled as to where they might turn, were in favor of intervention by the Indian Bureau in the hope that some sort of strong hand policy might pull Santa Clara out of the abyss. With the new Indian Reorganization Act as background, the Bureau of Indian Affairs now proposed and had accepted the concept of a tribal constitution which would provide for an elected secular government. At that time Laguna was the only pueblo with such an arrangement and there, as in Santa Clara, it had developed in the unhappy sequence of acculturation-stress-split syndrome, though in the Laguna case the early outside aid was not from the U. S. Government but from local whites.

Developing directly out of the new constitutional government in Santa Clara came written rules for tribal membership. The Santa Claras undoubtedly always had realized

that a moiety (Summer or Winter People) could secede as a unit, as the Winter People had threatened, but now they also were becoming aware of the desire of increasingly numerous non-Indians to pick up benefits of land, water, and possibly other resources through marriage into the tribe. The 1939 Santa Clara membership rules were intended to protect the pueblo. They were a codification of the old unwritten principle that membership in the tribe was tantamount to membership in one of the two moieties into which, in the past, every individual had been inducted and within which every family had its place as a unit. That was the system along which the break had taken place and which would have circumscribed each of the two new pueblos if the geographic separation so seriously contemplated had occurred, as it quite certainly would have in earlier times when free land still was available for occupation.

Let us now analyze the Laguna split which began about 1850 and came to a head "just about when the railroad came in", (1880 or 1881). The Laguna split was nothing less than civil war and the most outstanding event, by far, in the known history of this tribe. How was Laguna organized? Among the so-called "Western Pueblos" (Zuni, Hopi, Acoma, and Laguna), a division made by anthropologists on culture type rather than geographic lines, the family was the first primary unit of social organization and the clan the second. Both were matrilineal. These people also were matrilocal: a man moved into his wife's house at marriage (for Laguna see Parsons 1923:176). The kinship terms a person used for blood relatives within his mother's and his father's lineages differed appreciably, and persons married into the family were given distinctive terms. Houses were inherited through the matrilineal line. This still was mainly true in the very early 1920's when Parsons was there, although by that time the situation was relaxing. Parsons points out that changes in house ownership do exert some influence on kinship associations (Parsons 1923:248). The growing tendency of Lagunas to leave their home village in order to take outside jobs for periods of some years, plus a strong influence of the type involved with male ascendancy, have been very strong in Laguna as the result of Spanish and Anglo contacts. This much we know. What we know less about but can surmise through the specific bits and pieces Parsons picked up regarding religious societies, officers, and moieties is that Laguna's moiety system, weak in the 1920's, had been strong a century earlier but largely disappeared in the break.

The original founding of Laguna seems not to have been in 1698 or 1699, as customarily given by historians but, as indicated by sherds weathering from the southern ash pile, in the 15th century. (See Ellis, 1959). The ancestral nucleus, a Mesa Verdian-Acoma mixture, had been living in the pueblo of Punyana across the old lake from the knoll-outcrop where the village stands today. Only a few families may have made the initial move, but sometime between then and the last decade of the 17th century some families from the Rio Grande villages of Zia, Santa Ana, Cochiti, Jemez and, perhaps, Cieneguilla and other pueblos came into the area requesting a loan of lands. The historians say that the immigrants were getting out of the way of the Spaniards or were (less likely) seeking a spot where they could safely follow the Catholic religion. According to Laguna legend, however, they had left the Rio Grande because of drought (the tree-ring calendar substantiates this shortage of moisture) and consequent food shortage. Borrowing land for a time was not an uncommon practice in the past. Whatever the details, the Rio Grande contingent probably introduced Laguna's moieties, for the principle of dualism, so strong in the eastern pueblos, is weak in the western. I have been told that Laguna had two large kivas. The two sacred clown societies, in reality fertility societies and the most powerful in a pueblo, were, as in the Eastern Keresan villages, each associated with a moiety,

the Korena (Kurena, Kwiraina) with the Summer moiety and the Koshare or Kushale with the Winter. The closest ties of the cacique were to Koshare and Winter, which used the East Kiva. Summer used the West. (Parsons 1923: 231 and fn. 3).

From the standpoint of native culture preservation, Laguna had made a mistake in selecting the site of its village which was located on the main traveled road from east to west. Father Morfi reported 174 Indian families with 600 souls in Laguna in 1765 but added that 20 families of Spanish settlers lived in the same jurisdiction. In the late 1800's the Santa Fe railroad ran past the edge of the village. The main highway barely skirted it until the recent road change. More of a problem were the whites who settled in the pueblo, especially three who came about the same time and married into the tribe. These were Walter G. Marmon, Robert G. Marmon, and George Pradt (or Pratt), all surveyors. Walter became a government school teacher in 1870 or 1871; Robert became a trader. All were Protestants. Even before their time, a strong Protestant influence was being exerted by Rev. Samuel Gorman who settled in Laguna as a missionary in 1851. Dr. John Menaul lived in Laguna as a missionary from 1875 to 1887, superceding Marmon as missionary and teacher when the government school was taken over by the Presbyterian Church in 1875. The Marmons became so influential in the village that each served a term as Laguna governor, the appointment having been made by native religious leaders. The Marmons and some of the other six white men who later married into this pueblo sent their wives to school in Pennsylvania. Kwimé, the leader of the Korena society, had spent some years in Mexico with priests after his father, with whom he had gone south as a boy, died. Now that his sister had married one of the Marmons, he had further ties to the outer world. When we meet him about 1880, we find him using his connections with the whites to push the Progressive party, of which he was leader—which suggests that he probably was head of Summer moiety, also known as Squash. He undoubtedly was one of the two most powerful men in the village, the other being the cacique, who was associated with the Winter or Turquoise moiety, the Conservatives. The Conservatives followed the line of the old combination of Pueblo religion with Catholicism. Unfortunately, the cacique and some of the other major officers were elders and went down under confrontations and accusations of witchcraft. Matters went from threat to action until finally the main religious leaders and the families of the Conservatives were told to get out of the village. Some say that the image of the saint was pitched after them. Sadly packing their ceremonial paraphernalia on their backs, they started off on foot to settle for a short time at the small site of Mesita and then to go on into the Rio Grande seeking a new home. Isleta Pueblo, which had been worried over loss of some of their religious system through Spanish influences, the death of certain officers, and their close contact with Spanish Americans and Anglos in the Albuquerque area, accepted what remained of the group; the cacique already had died. Eventually, the majority of the Isleta Lagunas returned to Mesita, but even today relations between Mesita and Old Laguna tend to be uneasy. Kwimé had managed to make himself top man in Laguna, but he found his Progressives so uncomfortable without native religious observances that he had to bring in Acoma and Zuni aid to construct substitutes (Ellis 1959).

Our point is not the story of this split, with its details of shock and pain, but the fact that the split followed the same line as that in Santa Clara; division was by moiety group, the patrilineal faction entity.

The old constitution of Laguna Pueblo, modeled on that of the United States by the Marmons who did the writing ("We, the people of Laguna Pueblo, in order to establish —", etc.) has been revised and replaced. Laguna has

had the fortune to own uranium land, and after the leases had provided enough funds for the pueblo to do some public building, provide for scholarships, and invest for future security, it was decided that some moneys could be distributed to tribal members. How were tribal members to be defined? Already there was concern as to whether some intermarriages were based on a desire to share in the finances. For several years the council struggled with the problem, name by name, even sending officers to check in cities such as Holbrook and the area outside San Francisco where Indians have settled in numbers to work in the railroad shops.

Cochiti? Goldfrank (1927) and Lange (1959) have described the matrilineal clans and the patrilineal moieties of this pueblo, but it is Fox (1967:80-81) who has brought out the fundamental position of those moieties or kiva groups in the organization of the pueblo. Let us quote:

> "Despite the fact that the two *Kivas* are recruited by kinship and marriage, (a man takes his father's *Kiva*, a woman her husband's), Lange will not call them kinship groups, largely because there is an optative element in membership. The number of men who actually change *Kiva* is, however, extremely small, and membership is deeply felt. Even if more men changed their *Kiva*, this would not support his point. . . . (The Kiva) recruits members by kinship and marriage. . . . It is a kind of nationality. One has the same *Kiva* nationality as one's father. Each member is a citizen in his own right."

The kivas, as he says, are largely concerned with ritual, but in discussion of what he calls the patri-moiety we see the broad picture of this group's unity in thought and cooperation in action. A man, his wife, and his children are primarily citizens of their kiva. As some explain, one can change to the other kiva if personal troubles arise, but

eventually the one who has changed is likely to return to his own kiva because this, he feels, is his home.

After World War II Pueblo veterans returned with war brides who had little inclination for Pueblo life. By this time, the veterans themselves had experienced enough of the outside world to think in rather different terms than earlier. They wanted jobs which would bring in wages, and Cochitis sought these in Santa Fe as the Tewas sought them in Los Alamos and the Lagunas in the railroad towns or Albuquerque.

The pueblos which came to grips with the problems of citizenship within their tribes were the more acculturated, the more sophisticated in our understanding of the term and, therefore, more aware of the possibilities of loss of tribal resources to themselves or their descendants. When they set down rules stating that tribal membership for the offspring of mixed marriages should follow that of the father, they were putting into words the old generalities of moiety affiliation along which breaks occurred and withdrawal was possible, even though an occasional exception might occur. These were the lines which separated the in-group from the out-group, as they all knew even if they did not go into anthropological discussions of moieties and the big-kiva units of the Keres which ethnologists usually also designate as moieties. In truth, the Pueblos rarely talk freely about their clans, moieties, and religious societies to non-Indians. That the influence of Spanish and Anglo emphasis on use of father's name and responsibility for his children may have added some spur to the concept of tribal membership through father in mixed marriages is possible, but functioning patri-moieties go farther into the past than contacts with non-Indians.

The Wider Effects of the Tenth Circuit Court Decision in Martinez v. *Santa Clara Pueblo:* In the Pueblo system, the native government of each tribe-village since time immemorial has been responsible for the control and welfare

of its people. The system is more impressive, when one understands it because the men who comprised the pueblo officers and council were not paid. Their positions were considered to be a matter of their responsibility to their people; like all Pueblo communal work, it could be said to substitute for taxes, which pueblos do not levy. Nevertheless, officers and council members must spend a great deal of time at this work. They take their duties very seriously. Today the governors of Santa Clara and Laguna do receive a salary and spend full time at their duties. The situation varies in the other pueblos. However, it is still common that the officials are not paid and must give up their outside jobs to carry on their duties, sacrificing personal welfare for public good. It is not surprising that female relatives of a newly appointed governor used to weep for him and his family when the appointment—which could never be refused—was made public.

How do pueblo officers come into their positions? In the old Pueblo system, the leaders of all the religious organizations within a pueblo comprised what we would call a "religious council". Religion permeated daily life and the approval of supernatural beings was considered most important in earthly proceedings. The Spaniards who came into the Southwest in the 16th century were imbued with the concept of missionization and did not want to deal with "religious officers" of native peoples. In 1620, the King of Spain decreed that all native peoples under Spaniard rule must have a governor, lieutenant governor, and war captains, with their various assistants, to be elected annually. Among the Pueblos, these officers were appointed by the religious council from among the most responsible men of each village but with some concern that, if possible, they should speak the language of the outsiders and know something of their ways. The sequence of rapidly changing governors has made for difficulties in accomplishing projects of some scope, and today a number of the pueblos think of their governors as serving for at least two years

rather than one. Traditionally, all past governors and chief war captains automatically became council members and hence could continue to work for their pueblo in an advisory capacity. Although the religious officers of the pueblo originally used the secular officers largely as their "front men" and hence continued to handle much of the actual policies of a pueblo, outside contacts, especially since World War II, have secularized Pueblo governments to the point where the secular leaders act with a great deal more independence. The old native Pueblo religion itself has broken down considerably in some pueblos; it remains largely intact in others.

The pueblo council, then, is more important than ever as a governing body, and decisions may be put in the form of a statement from the governor but it is the council which has lengthily debated the issue and finally has reached an opinion on it. A pueblo council may be large, numbering as many as 40, but all of the men may not involve themselves, even though announcement of the meeting scheduled must be given everyone. The men meet in a council chamber which today is a modern building. The session is begun with a prayer by the governor, at which the men remove headbands if those are being worn. Each man is permitted to speak as long as he chooses on the subject under discussion; interruption is considered bad manners. The debates are apt to be lengthy because the old custom is to attempt to achieve universal agreement on what is to be done. Hence every side of the issue is discussed and rediscussed. There may not be table pounding, but there definitely can be shouting matches at touchy points, feelings as well as reasoning coming into the arguments as among ourselves. The feeling of responsibility to the pueblo is very strong and the council members, commonly unpaid, may spend days and nights working on an issue. The traditional values and customs are given a high priority as background to thinking; these have been tried and found to work through the centuries of the past and cannot

be unthinkingly flaunted in favor of something new unless thoroughly thought out. Consequently, the "Progressive" of a Pueblo probably would be categorized as Conservative in the broader view of the non-Indian.

The fact that the council and governor does feel responsible for the people of their pueblo and that the great majority look to council decisions as to the dictates of a careful and responsible set of family heads has kept the Pueblo tribes in general on an even keel. We have discussed the outstanding "breaks" as a means to understand the lines on which such separations may occur, but in none of the pueblos other than these we have discussed except, perhaps, San Ildefonso, has anything equal to those disruptions arisen. The system of Pueblo government is old, effective, and permeated with the concept of responsibility. What, then, is to happen to the Pueblo people if courts of the United States decide that it is their function rather than that of each Pueblo government council to say who shall and who shall not be members of the Pueblo, thus superimposing outside membership standards upon the Pueblos? If the Pueblo governing system cannot make these decisions, there is no decision which could be made by the Pueblo council for its people; any decision made could be challenged by some interested group and then tossed aside by courts in which the judges are outsiders thinking along lines of their own culture rather than that of these other peoples.

Such a situation obviously would herald the end of Pueblo culture as well as the end of Pueblo government. Stability would be gone.

Pueblo culture as a whole is changing, slowly. Among the Pueblo peoples, some individuals and families are changing faster than others, and there is nothing to prevent their moving into the outside world if they choose. That the authority of the governing body of any Pueblo should be overthrown to favor some small dissident unit

would be most dangerous, for small dissident units are known to be waiting in other pueblos to try their own efforts toward selfish ends should the first succeed. The real and very serious problem is a quick realization that if Pueblo governmental authority is no authority now, no matter how many centuries it has functioned to carry a very civilized people through dangers from a difficult environment and cultural contexts in the past, the celebrated Pueblo *stability* is lost. The fears of thinking Pueblo leaders today cannot be greater than the capacity for total disruption in all the pueblos if tribal authority is flaunted by U.S. authority.

References

Bandelier, Adolf F. 1890 Final Report of Investigations Among the Indians of the Southwestern United States, carried on mainly in the years from 1880 to 1885, Pt. I. *Papers of the Arch Inst. of America.* American Series IV.

Dozier, Edward P. 1966 Factionalism at Santa Clara Pueblo. *Ethnology* 15:2:172-185.

1970 *The Pueblo Indians of North America.*

Egan, Fred 1950 *Social Organization of the Western Pueblos.*

Ellis, Florence Hawley 1959 An outline of Laguna Pueblo History and Social Organization. *Southwestern Journal of Anthropology* 15:4:325-347.

Goldfrank, Esther Schiff 1927 The Social and Ceremonial Organization of Cochiti. *Memoirs of the American Anthropological Association* No. 33.

Lange, Charles 1959 *Cochiti: A New Mexico Pueblo Past and Present*

Lowie, R. H. 1929a Hopi Kinship. *Anthropological Papers of the American Museum of Natural History,* Vol. XXX, Pt. VII.

1929b Relationship Terms. *Encyclopedia Brittanica.* 14th Ed.

Morphi, Fr. Juan Agustin de 1969 "Geographical Description of New Mexico . . . 1782" in Thomas, Alfred Barnaby, *Forgotten Frontiers* pp. 85-114.

Ortiz, Alfonso 1969 *The Tewa World.*

Parsons, Elsie Clews Laguna Genealogies. *Anthropoligical Papers of the American Museum of Natural History* 19, Pt. 5.

1929 The Social Organization of the Tewa of New Mexico. *Memoirs of the American Anthropological Association,* No. 36.

Bibliography of Florence Hawley Ellis

Hawley, Florence M.

1926 The bells of San Xavier. *The Manuscript*: 14-15. Women's Press Club, University of Arizona, Tucson.

1929 Prehistoric pottery pigments in the Southwest. *American Anthropologist* 31:731-754.

1930a Chemical examination of prehistoric smudged wares. *American Anthropologist* 32:500-502.

1930b Prehistoric pottery and culture relations in the middle Gila. *American Anthropologist* 32:522-536.

1931 Chemistry in prehistoric American arts. *Journal of Chemical Education* 8:35-42.

1932a The Bead Mountain Pueblos of southern Arizona. *Art and Archaeology* 33:226-236.

1932b Oldest tree ring record of ancient Pueblos. *El Palacio* 34:108-110.

1932c Reply to Herman F. C. ten Kate's criticism of "Prehistoric pottery and culture relations in the middle Gila." *American Anthropologist* 34:548-550.

1933 Tree ring chronology in Chaco Canyon. *El Palacio* 34:204-205.

1934a The significance of the dated prehistory of Chetro Ketl, Chaco Canyon, New Mexico. *University of New Mexico Bulletin, Monograph Series* 1,1.

1934b Review of "Standards of pottery description," by B. March. *American Anthropologist* 36:607-609.

1936a Field manual of prehistoric southwestern pottery types. *University of New Mexico Bulletin, Anthropological Series* 1,4.

1936b The missing rings: no mystery story. *New Mexico Quarterly* 6,4:277-285.

1936c Fortune telling, via tree rings. *New Mexico Magazine* 14,6:15-17 *et seq.*

1936d Yes, we have no old apples. *New Mexico Magazine* 14,8:16-17 *et seq.*

1937a Pueblo social organization as a lead to Pueblo history. *American Anthropologist* 39:504-522.

1937b Kokopelli, of the prehistoric southwestern Pueblo pantheon. *American Anthropologist* 39:644-646.

1937c Reversed stratigraphy. *American Antiquity* 2:297-299.

1937d Relationship of southern cedar growth to precipitation and runoff. *Ecology* 18,3:398-405.

1937e Anthropologists at home. *Eleusis of Chi Omega*: 54-58. University of Arizona, Tucson.

1937f Ancient New Mexicans. *New Mexico Magazine* 15, 7:22-23 *et seq.*

1937g (With D. Senter) Hopi and Navajo child burials. *American Anthropologist* 39,1:131-134.

1937h (With D. D. Brand, F. C. Hibben, *et al.*) Tseh So, a small house ruin, Chaco Canyon, New Mexico. *University of New Mexico Bulletin, Anthropological Series* 2,2.

1937i Review of "Lowry Ruin in southwestern Colorado," by P. S. Martin. *American Anthropologist* 39:328-330.

1937j Review of "Archaeological survey of the Guano Valley region in southeastern Oregon," by L. S. Cressman. *American Anthropologist* 39:332-334.

1937k Review of "Evidence of early man in North America," by E. B. Howard. *American Anthropologist* 39,1:139-140.

1938a Classification of black pottery pigments and paint areas. *University of New Mexico Bulletin, Anthropological Series* 2,4.

1938b The family tree of Chaco Canyon masonry. *American Antiquity* 3:247-255.

1938c Tree ring dating for southeastern mounds. In An archaeological survey of the Norris Basin in eastern Tennessee, by W. S. Webb, pp. 359-362. *Bureau of American Ethnology, Bulletin* 118.

Senter, Florence H.

1938d Dendrochronology: can we fix prehistoric dates in the Middle West by tree rings? In Proceedings of the Nineteenth Annual Indiana History Conference. *Indiana History Bulletin* 15,2:118-128.

1938e Dendrochronology in two Mississippi drainage tree-ring areas. *Tree Ring Bulletin* 5:3-6.

1938f Southwestern dated ruins: IV, Chaco Canyon, New Mexico. *Tree Ring Bulletin* 5:6-7.

Hawley, Florence M.

1939a Mummy dusters . . . New Mexico style. *New Mexico Magazine* 17,3:20-21 *et seq.*

1939b Pueblo politics. *New Mexico Magazine* 17,8:16-17 *et seq.*

1939c New applications of tree ring analysis to problems of archaeology, botany, and geology. In *So live the works of men;* seventieth anniversary volume honoring Edgar Lee Hewett, edited by D. Brand and F. Harvey, pp. 177-186. University of New Mexico Press, Albuquerque.

1939d (With C. Kluckhohn, D. Osborne, *et al.*) Preliminary report on the 1937 excavations, BC 50-51, Chaco Canyon, New Mexico. *University of New Mexico Bulletin, Anthropological Series* 3:2.

1940a Squash-blossom headdress in Basket Maker III. *American Antiquity* 6:167.

1940b Pueblo wedding. *New Mexico Magainze* 18,8:14-15 *et seq.*

1940c Dendrochronology: tree ring experts establish a new science which reveals dates of prehistoric structures. *Southern Lumberman* 161:149-153.

1940d (With Neil M. Clark) Trees do not lie. *American Forest* 46:66-69.

1940e (With Neil M. Clark) History as tree rings tell it. *Readers Digest* 21:102-104.

1941a Tree-ring analysis and dating in the Mississippi drainage. *University of Chicago Publications in Anthropology, Occasional Papers* 2.

1941b (With E. J. Workman) Protocol: a new dendrochronograph. In Tree-ring analysis and dating in the Mississippi drainage, pp. 101-103. *University of Chicago Publications in Anthropology, Occasional Papers* 2.

1941c We can learn about children from them. *Parents Magazine* 16,7:26-27 *et seq.*

1941d Ancient floods and drouths and growing conditions. *Southern Lumberman* 163:157-160.

1942 Navajo night. *New Mexico Magazine* 20,7:22 *et seq.*

1943 (With M. Pijoan and C. A. Elkin) An inquiry into food economy and body economy in Zia Pueblo. *American Anthropologist* 45:547-556.

1946a The role of Pueblo social organization in the dissemination of Catholicism. *American Anthropologist* 48:407-415.

1946b (With D. Senter) Group-designated behavior patterns in two acculturating groups. *Southwestern Journal of Anthropology* 2:133-151.

1946c (With D. Senter) The grammar school as the basic acculturating influence for native New Mexicans. *Social Forces* 24:398-407.

1948a *The Indian problem in New Mexico.* Division of Research, Department of Government, University of New Mexico, Albuquerque .

1948b An examination of problems basic to acculturation in the Rio Grande Pueblos. *American Anthropologist* 50:612-624.

1948c The Keresan Holy Rollers: an adaptation to American individualism. *Social Forces* 26:272-280.

1948d Santos and prayer plumes. *New Mexico Magazine* 26,7:19 *et seq.*

1948e Dance of the devil chasers. *New Mexico Magazine* 26,9:16 *et seq.*

1948f Pueblo politics. In *This is New Mexico,* edited by G. Fitzpatrick, pp. 221-227. Rydal Press, Santa Fe.

1948g Problems and progress of Indians attempting participation in urban white culture. Preface to a collection of graduate papers written under the direction of Florence M. Hawley. Ms.

1949a Cultural patterns of the Southwest as they affect rural problems. In *Rural life and education,* pp. 40-43. Rocky Mountain Regional Rural Life and Education Conference, Albuquerque.

1949b Review of "Man and his works," by M. J. Herskovits. *New Mexico Quarterly Review* 19:253-254.

1950a Keresan patterns of kinship and social organization. *American Anthropologist* 52:499-512.

1950b Big kivas, little kivas, and moiety houses in historical reconstruction. *Southwestern Journal of Anthropology* 6:286-302.

1950c The mechanics of perpetuation in Pueblo witchcraft. In *For the Dean, essays in honor of Byron Cummings*, edited by E. K. Reed and D. S. King, pp. 143-158. Hohokom Museums Association, Tucson, and Southwestern Monuments Association, Santa Fe.

1950d Field manual of Southwestern pottery types, revised edition. *University of New Mexico Bulletin, Anthropological Series* 1,4.

1950e (With J. and L. Jones, M. Sloane, B. Garner, E. Hill, and J. Fried) Culture process and change in Ute adaptation. *El Palacio* 57, 10-11: 311-331, 345-361.

1950f One Navaho's life problems. Review of "Gregorio, the hand trembler," by A. Leighton. *New Mexico Quarterly Review* 20:105-109.

Ellis, Florence Hawley

1951a Pueblo social organization and southwestern archaeology. *American Antiquity* 17:148-151.

1951b Pattern of aggression and the war cult in southwestern Pueblos. *Southwestern Journal of Anthropology* 7:177-201.

1951c An American the hard way. *New Mexico Quarterly* 21:299-312.

1951d Review of "Social organization of the western Pueblos," by F. Eggan. *American Antiquity* 17:66. See also *Southwestern Humanities Review* 5:202-203.

1951e Review of "Some beliefs and practices in a Navajo community," by F. Bailey. *New Mexico Historical Review* 26:248-250.

1952a Jemez kiva magic and its relation to features of prehistoric kivas. *Southwestern Journal of Anthropology* 8:147-163.

1952b Revival of glaze ware. *New Mexico Magazine* 30, 7:22 *et seq.*

1952c Passion play in New Mexico. *New Mexico Quarterly* 22:200-212.

1952d Pueblo of the Sun: life orientation in Zia Pueblo. Ms.

1952e (With J. M. Campbell) The Atrisco sites: Cochise manifestations in the middle Rio Grande Valley. *American Antiquity* 17:211-221.

1953a Authorative control and the society system in Jemez Pueblo. *Southwestern Journal of Anthropology* 9:385-394.

1953b Saints in wood. *New Mexico Magazine* 31, 11:17 *et seq.*

1954a Santeros of Tomé. *New Mexico Quarterly* 24, 3:3-10.

1954b The dancing people. *Inter-Tribal Indian Ceremonial*, Gallup, New Mexico.

1954c Comment on "Spanish-Indian acculturation in the Southwest," by E. H. Spicer. *American Anthropologist* 56, 4 (Southwest Issue, edited by E. W. Haury): 678-680.

1954d Review of "Changing military patterns of the Great Plains," by F. R. Secoy. *New Mexico Historical Review* 29, 1: 76-80.

1954e Review of "A study in culture contact and culture change: the Whitrock Utes in transition," by G. O. Lank. *El Palacio* 61,11:377-380.

1955b Tomé and Father J.B.R. (concluded). *New Mexico Historical Review* 30,3:195-220.

1955c Review of "A foundation for the dating of some late archaeological sites in the Rio Grande area, New Mexico: based on studies in tree-ring methods and pottery analysis," by T. I. Smiley, S. A. Stubbs, and B. Bannister. *American Antiquity* 20,3:292-293.

1956 Anthropological evidence supporting the land claim of the Pueblos of Zia, Santa Ana, and Jemez. Ms., mimeographed. Indian Land Claims Commission, Washington, D. C.

1957a Anthropological research in New Mexico. *New Mexico Quarterly* 27:366-370.

1957b (With E. Baca) The Apuntes of Father J. B. Ralliere. *New Mexico Historical Review* 32,1:10-35.

1957c (With E. Baca) The Apuntes of Father J. B. Ralliere (concluded). *New Mexico Histrical Review* 32,3:259-273.

1957d Anthropology of Laguna Pueblo land claim. Ms., mimegraphed. Indian Land Claims Commission, Washington D. C.

1959a An outline of Laguna Pueblo history and social organization. *Southwestern Journal of Anthropology* 15:325-347.

1959b The woman's page: Laguna Pueblo. *El Palacio* 66:16-20.

1959c Laguna bows and arrows. *El Palacio* 66:91.

1959d (With M. Walpole) Posible Pueblo, Navajo, and Jicarilla basketry relationships. *El Palacio* 66:181-198.

1961a An anthropological study of the Navaho Indians. Ms., mimeographed. Indian Land Claims Commission, Washington, D. C.

1961b The Hopi, their history and use of lands. Ms., mimeographed. Indian Land Claims Commission, Washington, D. C.

1962a Archaeological evidence pertaining to the land claim of Nambe Pueblo. Ms., mimeographed. Indian Land Claims Commission, Washington, D. C.

1962b Archeological evidence pertaining to the land claim of Taos Pueblos. Ms., mimegraphed Indian Land Claims Commission, Washington, D. C.

1963 Review of "Rock art in the Navajo reservoir district," by P. Schaafsma. *American Anthropologist* 65,6:1396.

1964a A reconstruction of the basic Jemez pattern of social organization, with comparison to other Tanoan social structures. *University of New Mexico Publications in Anthropology* 11.

1964b Archaeological history of Nambe Pueblo, 14th century to the present. *American Antiquity* 30:34-42.

1964c Comment on Jett's "Pueblo Indian migrations." *American Antiquity* 30:213-215.

1964d Possible archaeological, traditional, and linguistic guideposts to the prehistoric homes of the modern Pueblo Indians. Ms. for Wetherill Mesa Project, National Park Service.

1964e (With J. J. Brody) Ceramic stratigraphy and tribal history at Taos Pueblo. *American Antiquity* 29:316-327.

1965a (With L. Hammack) Shrine of ancient warriors. *New Mexico Magazine* 43,9:6 8 *et seq.*

1965b Review of "Excavation of a portion of East Ruin, Aztec Ruins National Monument, New Mexico," by R. Richert. *American Antiquity* 31,2:280-281.

1966a The immediate history of Zia Pueblo as derived from excavations in refuse deposits. *American Antiquity* 31:806-811.

1966b Pueblo boundaries and their markers. *Plateau* 38: 97-106.

1966c On distinguishing Laguna from Acoma polychrome. *El Palacio* 73:37-39.

1967a Use and significance of the tcamahia. *El Palacio* 74,1:35-43.

1967b Where did the Pueblo people come from? *El Palacio* 74,3:35-43.

1967c Review of "Kin Kletso: a Pueblo III community in Chaco Canyon, New Mexico," by G. Vivian and T. Mathews. *American Anthropologist* 69,1:100.

1967d Review of "Tree-ring dating of the archaeological sites in the Chaco Canyon region, New Mexico," by B. Bannister. *American Anthropologist* 69,1:100.

1967e Review of "Contributions to Mesa Verde archaeology: II. Site 875, Mesa Verde National Park, Colorado," by R. H. Lister. *American Anthropologist* 69,1:101.

1967f Review of "The archaeological survey of Wetherill Mesa: Mesa Verde National Park—Colorado," by A. C. Hayes. *American Anthropologist* 69,1:101.

1967g Review of "Pueblo warriors and Spanish conquest," by O. L. Jones, Jr. *American Antiquity* 32:253-255.

1967h Review of "People of Rimrock," edited by E. Z. Vogt and E. M. Albert. *New Mexico Historical Review* 42, 3:239-241.

1968a What Utaztecan ethnology suggests of Utaztecan prehistory. In Utaztecan prehistory, edited by E. H. Swanson, Jr., pp. 53-105. *Occasional Papers of the Idaho State University Museum* 22.

1968b An interpretation of prehistoric death customs in terms of modern southwestern parallels. In Collected papers in honor of Lyndon Lane Hargrave, edited by A. H. Schroeder, pp. 57-76. *Papers of the Archaeological Society of New Mexico* 1.

1968c (With L. Hammack) The inner sanctum of Feather Cave, a Mogollon sun and earth shrine linking Mexico and the Southwest. *American Antiquity* 33:25-44.

1968d Review of "Prehistory in the Navajo reservoir district, *Northwestern New Mexico,*" by F. W. Eddy. *American Anthropologist* 70, 4:420-421.

1969 Differential Pueblo specialization in fetiches and shrines. *Anales, 1967-1968, Sobretiro, Septima epoca, Tomo* 1:159-180.

1970a Pueblo witchcraft and medicine. In Systems of North American witchcraft and sorcery, edited by D. E. Walker, Jr., pp. 37-72. *Anthropological Monographs of the University of Idaho* 1.

1970b What happened to the people of the Jornada Branch? Ms.

1970c Review of "Spanish presidios of the late eighteenth century in northern New Spain," by R. E. Gerald. *American Anthropologist* 72:446-447.

1971a Across some decades. (Presidential address at the seventeenth annual meeting of the American Society for Ethnohistory) *Ethnohistory* 18, 4:295-307.

1971b Reviews of "The Navajo Mountain community," by M. Shepardson and B. Hammond, and "With a camera in old Navaholand," by E. Forrest. *Arizona and the West,* Winter: 380-382.

1974a Anthropological data pertaining to the Taos land claim. In *American Indian Ethnohistory, Pueblo Indians* 1:29-105. Garland Publishing, Inc., New York.

1974b Anthropology of Laguna Pueblo land claims. In *American Indian Ethnohistory, Pueblo Indians* 3. Garland Publishing, Inc., New York.

1974c Anthropological study of the Navajo Indians. In *American Indian Ethnohistory, Navajo Indians* 1. Garland Publishing, Inc., New York.

1974d The Hopi: their history and use of lands. In *American Indian Ethnohistory, Hopi Indians. Garland Publishing, Inc., New York.*

1974e Review of "Witchcraft in the Southwest. Spanish and Indian supernaturalism on the Rio Grande," by M. Simmons. *El Palacio* 80,3:49-50.

1975a A thousand years of the Pueblo sun-moon-star calendar. In *Archaeoastronomy in pre-Columbian America,* edited by A. F. Eveni. 1975 University of Texas Press, Austin.

1975b A pantheon of Kachinas. *New Mexico Magazine* 53:3:13-28.

1975c Highways to the Past. New Mexico Magazine 53:5:18-25.

n.d. Anthropological evidence pertaining to the land claim of Nambe Pueblo. In *American Indian Ethnohistory.* Garland Publishing, Inc., New York.

n.d. Anthropological evidence supporting the land claim of the Pueblos of Zia, Santo Ana, and Jemez. In *American Indian Ethnohistory.* Garland Publishing, Inc., New York.

1974f Archaeologic and ethnologic data: Acoma-Laguna land claims. In *American Indian Ethnohistory, Pueblo Indians* 2. Garland Publishing, Inc., New York.

n.d. Isleta. In *Handbook of North American Indians* 9: The Southwest, edited by A. Ortiz, Part 1, Ethnology. Smithsonian Institution, Washington, D.C.

n.d. Laguna. In *Handbook of North American Indians* 9: The Southwest, edited by Ortiz, Part 1, Ethnology. Smithsonian Institution, Washington, D. C.

1974g Anthropology of Laguna Pueblo Land Claims. In *Pueblo Indians III,* pp. 9-120. Garland Pub. Co.

1974h Anthropological Data Pertaining to the Taos Land Claim. In *Pueblo Indians I,* pp. 29-150. Garland Pub. Co.

1974i *The Hopi: Their History and Use of Land.* Garland Pub. Co. 233 pp.

1974j An Anthropological Study of the Navajo Indians *Navajo Indians I.* Garland Pub. Co. 571 pp.

1975d Life in the Tesuque Valley and Elsewhere in the Santa Fe Area during the Pueblo II Stage of Development. *Awanyu* 3(2): 27-49. (Arch. Sec. of N.M.)

1975e Datable Ritual Components Proclaiming Mexican Influence in the Upper Rio Grand of New Mexico. Paper read at meeting of SW Div. of AAAS, Spring 1975, Santa Fe. In press.

1975f Bandelier's Generation and Ethnological Analogy—Then, Now, and in Between. The Bandelier lecture for Archaeological Society of New Mexico, Apr. 26, 1975. In press. *Awanyu*

1975g Review: The Changing Ways of Southwestern Indians: A Historical Perspective edited by A.D. Schroeder. In Press, *Ethnohistory*

1974f also appeared as Ethnology. Archaeologic and Ethnologic Data, Acoma and Laguna in New Mexico. 1973. Clearwater Publishing Co. Microeditions Hachette. (Indian Claims Commission-Testimony). (F. R. Ellis)

1974h also appeared as Anthropology (Indian Claims Commission—Testimony) Taos of New Mexico, to 1960 Clearwater Pub. Co., Inc. 1973 (F. Ellis) Microeditions Hachette.

1974 also appeared as History (Indian Claims Commission-Testimony) History and Land Use of the Hopi in New Mexico and Arizona (sic) 1200's-1900's (F. H. Ellis). Clearwater Pub. Co. 1973. Microeditions Hachette.

also appeared as Anthropology (Indian Claims Comm.-Testimony) Laguna Pueblo Land Claims in New Mexico, 1276-19th century. F. H. Ellis Clearwater Pub. Co. 1973. Microeditions Hachette.

APPENDIX L.

Affidavit

STATE OF NEW MEXICO
COUNTY OF BERNALILLO } ss.

SEFERINO LENTE, of lawful age and upon being duly sworn upon his oath, states:

1. That he is the Governor of the Pueblo of Isleta, an Indian Tribe duly recognized by the Secretary of Interior of the United States Government; that he has been the Governor since his inauguration into office in January, 1975. That he has held tribal office for a number of years, including a two-year term as Secretary of the Tribal Council.

2. That the Pueblo of Isleta is an ancient community, there being anthropogelical evidence that it has existed in its present situs for at least ten thousand (10,000) years. The Puebla of Isleta is a traditional Indian community, the sources of its unity being its land, the language which is still preserved and is the first language of the Isleta Indian people, the religion, and the tradition of the Pueblo. While the Tribe, unlike some Indian Pueblos, does not disallow women from the voting process nor from other aspects of tribal government, they share with virtually all Indian Pueblos certain rules with respect to non-Indian men or non-Isleta Indians residing upon and participating in its traditional events. The traditional rule is and has been that an Isleta man may marry and bring onto the reservation his non-member wife. The children of the union will be regarded as Isleta Indians and may participate in all of the religious and traditional functions. On the other hand, if an Isleta woman marries a non-member man, she is expected to live with him at his home, presumably at another reservation where he will be expected to live by rules which are similar to ours. This rule is not based on a feeling that women are inferior in any respect; to the contrary, they

have an equal if not greater responsibility in family life and other elements of tribal life which make our culture unique.

3. All Isleta men are expected to participate in the community work which is related to that culture and tradition. For example, irrigation for farming is our lifeblood, and all men must do a certain amount of community work in that regard. Women simply cannot do that work. This is not optional. *All men* must perform these obligations.

4. That it is also important that the Pueblo of Isleta retain its culture and language and not become a haven for non-member men who do not speak the language, who do not share and perform the community obligations, and who marry, seeking a safe haven from such obligations.

5. That if we allow or encourage non-member men to live on our reservation, which would be the effect of the *Martinez case*, it would only be a matter of time before we would lose our language, tradition, and culture, the essential qualities of our Indian community.

/s/ SEFERINO LENTE
Seferino Lente
Governor, Pueblo of Isleta

(Subscription Omitted in Printing)

Supreme Court, U. S.
FILED
JUL 15 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO, et al, *Petitioners*,

v.

JULIA MARTINEZ, et al, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR CERTIORARI FILED NOVEMBER 15, 1976

CERTIORARI GRANTED MAY 16, 1977

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Relevant Docket Entries

Petitioner and Respondent agree that there are no relevant docket entries that require inclusion in this Appendix.

The Judgment, Order or Decision in Question

The Supplemental Memorandum Opinion on Jurisdiction filed by the District Court is found at pages 1(a)-11(a) of the Appendix to the Petition for Writ of Certiorari filed herein. The Memorandum Opinion on the merits by the District Court is found at pages 12(a)-26(a) of the Appendix to the Petition. The Judgment of the District Court is found at pages 27(a) of the Appendix to the Petition. The Opinion of the Tenth Circuit Court of Appeals, Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976) is found at pages 28(a)-45(a) of the Appendix to the Petition.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

CONSTITUTION AND BYLAWS OF THE PUEBLO OF SANTA CLARA
NEW MEXICO

APPROVED DECEMBER 20, 1935

[seal]

CONSTITUTION AND BYLAWS OF THE PUEBLO OF SANTA CLARA, NEW MEXICO

PREAMBLE

We, the people of Santa Clara Pueblo, in order to establish justice, promote the common welfare and preserve the advantages of self-government, do ordain and establish this constitution.

ARTICLE I—JURISDICTION

This constitution shall apply within the exterior boundaries of Santa Clara pueblo grant and to such other lands as are now or may in the future be under the jurisdiction of the pueblo of Santa Clara. This constitution shall apply to and be for the benefit of all persons who are members of the pueblo of Santa Clara.

ARTICLE II—MEMBERSHIP

SECTION 1. *Conditions of membership.*—The membership of the Santa Clara pueblo shall consist as follows:

(a) All persons of Indian blood whose names appear on the census roll of the Santa Clara pueblo as of November 1, 1935, provided that within one year from the adoption and approval of this constitution corrections may be made in the said roll by the pueblo council with the approval of the Secretary of the Interior.

(b) All persons born of parents both of whom are members of the Santa Clara pueblo.

(c) All children of mixed marriages between members of the Santa Clara pueblo and nonmembers, provided such children have been recognized and adopted by the council.

(d) All persons naturalized as members of the pueblo.

SEC. 2. *Naturalization.*—Indians from other pueblos or reservations who marry a member of Santa Clara pueblo may become members of the pueblo, with the assent of the council, by naturalization. To do this they must (1) go before the pueblo council and renounce allegiance to their tribe and declare intention of becoming members of the Santa Clara pueblo. They shall swear that from that date on they will not receive any benefits from their people, except through inheritance. (2) A year later they shall go before the pueblo council again, swear allegiance to the pueblo of Santa Clara and receive membership papers; provided, they have kept their promise from the time of their first appearance before the pueblo council.

ARTICLE III—ORGANIZATION OF THE PUEBLO COUNCIL

SECTION 1. *Officers.*—The governing power of the pueblo of Santa Clara shall be vested in the pueblo council which shall consist of the following officers:

Officers:	*Number*
Governor	1
Lieutenant Governor	1
Representatives	8
Secretary	1
Treasurer	1
Interpreter	1
Sheriff	1

and such other officers as the council may recognize or appoint.

SEC. 2.—*Election of Governor, Lieutenant Governor, secretary, treasurer, interpreter, and sheriff.*—On the first Saturday of each year an election shall be held within the pueblo of Santa Clara, at which a Governor, Lieutenant Governor, secretary, treasurer, interpreter, and sheriff shall be elected by secret ballot to serve for the ensuing year.

SEC. 3. *Who may vote.*—Every member of the pueblo of Santa Clara who is of sane mind and over 18 years of age, may vote at any election. Any member who is absent from the pueblo on the date of any election shall have the right to vote by mail under such rules as may be prescribed by the pueblo council.

SEC. 4. *Candidates.*—Candidates for Governor, Lieutenant Governor, secretary, treasurer, interpreter, and sheriff shall be nominated at least fifteen (15) days before the date upon which each election is to be held. Nominations for the first election shall be made by the recognized parties now existing within the pueblo. Thereafter, nominations shall be made in a manner prescribed by the council of the pueblo.

SEC. 5. *Representatives.*—Two representatives shall be appointed to the pueblo council upon the date of the first election, for a term of 1 year by each of the four recognized nized parties now existing within the pueblo, and in all future elections eight representatives shall be chosen in a manner to be prescribed by the council.

SEC. 6. *Manner of elections.*—All nominations for office and elections shall be made and held in a manner prescribed by the council of the pueblo.

ARTICLE IV—THE PUEBLO COUNCIL AND ITS POWER

SECTION 1. *Legislative power.*—The legislative power shall be vested in the pueblo council, and the said power shall be exercised in accordance with, and not in conflict

with, the constitution or any laws of the United States of America.

The pueblo council shall have the following rights and powers:

1. To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

2. To prevent the sale, disposition, lease, or encumbrance of pueblo lands, interests in lands, or other tribal assets.

3. To negotiate with the Federal, State, and local governments, and with the councils and governing authorities of other pueblos or Indian tribes.

4. To advise the Secretary of the Interior with regard to all appropriation estimates or Federal projects for the benefit of the pueblo prior to the submission of such estimates to the Bureau of the Budget and to Congress.

5. To enact ordinances, not inconsistent with the constitution and bylaws of the pueblo, for the maintenance of law and order within the pueblo and for the punishment of members, and the exclusion of nonmembers violating any such ordinances, for the raising of revenue and the appropriation of available funds for pueblo purposes, for the regulation of trade, inheritance, land-holding, and private dealings in land within the pueblo, for the guidance of the officers of the pueblo in all their duties, and generally for the protection of the welfare of the pueblo and for the execution of all other powers vested in the pueblo by existing law: *Provided*, That any ordinance which affects persons who are not members of the pueblo shall not take effect until it has been approved by the Secretary of the Interior or some officer designated by him.

6. To delegate any of the foregoing powers to appropriate officers of the pueblo, reserving the right to review any action taken by virtue of such delegated power.

SEC. 2. *Judicial power.*—The pueblo council shall also adjudicate all matters coming before it over which it has jurisdiction. In all controversies coming before the pueblo council, the council shall have the right to examine all witnesses and ascertain full details of the controversy, and after the matter shall have been sufficiently commented upon by the interested parties, the council shall retire to a private place to make a decision. All of the members of the council except the Governor and the Lieutenant Governor shall have the right to vote upon a decision, and a majority shall rule. In the event of a tie, the Governor shall have the right to cast a vote, thereby breaking the tie. It shall be the duty of the Governor and the Lieutenant Governor to express to the other members of the pueblo council their views regarding the case before a vote is taken.

SEC. 3. *Common law of pueblo.*—With respect to all matters not covered by the written constitution, bylaws, and ordinances of the pueblo of Santa Clara, nor by those laws of the United States of America which are applicable to the pueblo of Santa Clara, the customs and usages of the pueblo, civil, and criminal, as interpreted by the council, shall have the force of law.

ARTICLE V—THE GOVERNOR, HIS POWERS AND DUTIES

The Governor shall be the executive head of the pueblo government. It shall be his duty to enforce the laws of the pueblo, civil and criminal, written and unwritten. If any person considers that any ruling of the Governor is unjust, he shall have the right to demand through any representative of the pueblo council or directly to the pueblo council that the matter be brought before the pueblo council for adjudication at the next meeting of said officers.

In all community work the Governor shall be the sole overseer unless he is unavoidably absent, in which event the Lieutenant Governor shall have the same rights and duties as the Governor.

Article VI—Vacancies and Impeachments

Sec. 1. *Vacancies.*—Should any vacancy occur in any of the offices or any member of the council, the council shall, by a majority vote, have the right to name a successor for the said office, except that in the event the office of Governor becomes vacant for any reason, then and in that event the Lieutenant Governor shall thereupon become the Governor with all duties and powers of the said office, and further, that the successor to any pueblo representative appointed by a particular group shall be chosen by the same group.

Sec. 2. *Impeachment.*—Any officer charged with grave offenses may be tried before the other members of the council. The manner of conducting impeachment shall be prescribed by the council. The council shall act as the trial court, and if they decide, by a two-thirds vote, to remove the accused member from the office he will be removed.

Article VII.—Land

Section 1. *Pueblo title.*—Title to all lands of the pueblo, whether assigned to the use of individuals or withheld for the common use of the members of the pueblo, shall forever remain in the pueblo itself and not in the individual members thereof. All the members of the pueblo are declared to have an equal right to make beneficial use, in accordance with ordinances of the council, of any land of the pueblo not heretofore or hereafter assigned to individual members.

For the purpose of this article the word "member" shall be defined by the council.

Sec. 2. *Individual rights of possession.*—The right of full possession shall be guaranteed to every member of the pueblo, holding lands assigned to him by the Pueblo Council, for cultivation or other purposes: *Provided,* That no member holding said lands shall sell or will same to an alien. All lands assigned to individuals of the pueblo must

be completely fenced within three years. Any violation of the above provision shall be sufficient cause for the council to dispossess him of said land. He shall have the right, however, to rent to a pueblo member or, with the approval of the council, to an alien, all lands under his possession, for a term not to exceed two years. He shall have the right to sell his interest in said lands to any other member of the pueblo after his assignment has been finally approved, subject to such regulations as the council may prescribe.

Sec. 3. *Council to have power of granting assignments.*—When any member of the pueblo desires a piece of unimproved pueblo land, he shall select his land, and then make his application for same to the council of the pueblo. If the council decides to grant him the land or any part thereof, they shall mark out the boundaries of same. The grantee shall thereafter have full possession of said land, unless the council shall, in accordance with the constitution, bylaws, and ordinances of the pueblo, dispossess him of the same.

Sec. 4. *Prior assignments recognized.*—All assignments of land heretofore made by the pueblo authorities are hereby recognized and confirmed.

Article VIII.—Amendments

No amendments or changes shall be made in the constitution or bylaws of the pueblo except by a decision of the general pueblo. At the request of the council the Secretary of the Interior shall submit any proposed amendment to the said constitution or bylaws to a vote of the people. If such amendment is approved by a majority of the qualified voters of the pueblo, 21 years old or over, voting at an election in which at least 30 percent of those entitled to vote shall vote, it shall be submitted to the Secretary of the Interior, and if he shall approve the same it shall become effective.

BYLAWS OF THE PUEBLO OF SANTA CLARA, NEW MEXICO

ARTICLE I.—DUTIES OF OFFICERS

SECTION 1. *Governor.*—The Governor shall be in full charge of all meetings of the pueblo council. It shall be his duty to see that perfect order is preserved in every respect. In the discussion of all business but one person shall be allowed to speak at a time, and the Governor shall have the right to set a time limit upon speakers. When any member of the pueblo council or any other person desires to speak at a meeting of the pueblo council, such person shall first ask permission of the Governor to do so before proceeding. It shall be the duty of the Governor to see that all business presented to the council within any month be disposed of, if possible, before the beginning of the next month.

SEC. 2. *Lieutenant Governor.*—The Lieutenant Governor shall be next in rank to the Governor. In case of the death, resignation, absence, impeachment, or other disability of the Governor, the Lieutenant Governor shall become Governor or act as Governor during such disability or absence. As long as the Governor is at the pueblo holding office, the Lieutenant Governor shall have the power only of a representative in the council, except as otherwise provided in the constitution and bylaws of the pueblo.

SEC. 3. *Representatives.*—Representatives shall represent their people in the pueblo council. They shall bring before the council at every meeting the matters that their people want brought before the council and such other matters as each representative believes should be presented to the council. Such matters may originate with any member of the pueblo or may originate with the representative himself.

SEC. 4. *Secretary.*—The secretary shall keep a record of all council proceedings and all business authorized or transacted by the council. At the beginning of each regular meeting, he shall call the roll of councilmen and all specially summoned persons expected to be present. He shall then read the minutes of the previous meeting and the officers shall then decide as to whether they should be approved as they stand, and all persons present shall have the right to suggest corrections. After the minutes of the previous meeting have been accepted, the secretary will then mark them approved. The secretary shall attend to all official correspondence as directed by the pueblo council and the Governor.

SEC. 5. *Treasurer.*—It shall be the duty of the treasurer to receive all money due to the pueblo and to give a receipt for the same. He shall deposit the pueblo money in a bank which should be approved by the pueblo council. He shall keep a record in his books of all moneys received and paid out. Moneys of the pueblo shall be paid by check signed by the treasurer and countersigned by the Governor. No moneys shall be paid out unless the same shall have been authorized to be expended by the council and vouchers for same shall have been signed by the Governor and the secretary. At each regular meeting of the pueblo council, the treasurer shall present to them a statement of receipts and disbursements made by him since the last regular meeting and he shall submit to the pueblo council at each regular meeting all of his books and a statement of the financial condition of the pueblo funds.

SEC. 6. *Interpreter.*—The interpreter shall translate from the Tewa language into the English language or from English into the Tewa language whenever directed to do so by the pueblo council. He shall also assist the secretary with the official correspondence of the pueblo.

SEC. 7. *Sheriff.*—It shall be the duty of the sheriff to assist the Governor in keeping law and order in the pueblo. He shall maintain order at all meetings, also in the village and on the pueblo lands. He shall report on disorders to

the council. He shall have authority to stop trouble immediately wherever he finds it, without special authorization from the Governor. In case of disputes or difficulties the sheriff shall bring the parties in controversy before the council for a decision. He shall bring before the council for punishment all violators of the laws of the pueblo. He shall serve notices or summons upon all persons required to be present before the council in criminal or civil proceedings.

Article II.—Qualifications of Office

Section 1. *Qualifications of Governor and Lieutenant Governor.*—The Governor and the Lieutenant Governor must be at least twenty-five (25) years of age and shall not be over sixty-five (65) years of age. They must be members of the pueblo of Santa Clara and be residents of said pueblo at the time of their election. They must be able to speak the Tewa language fluently and also be able to speak either the English or Spanish languages well enough to be understood.

Sec. 2. *Qualifications of representatives.*—The representatives must be at least twenty-five (25) years of age. They must be members of the pueblo of Santa Clara and residents thereof at the time of their selection. They must be able to speak the Tewa language fluently.

Sec. 3. *Qualifications of secretary, treasurer, and sheriff.*—The secretary, treasurer, and sheriff must be not less than twenty-five (25) years of age and not over sixty-five (65) years of age. They must be members of the pueblo of Santa Clara and residents thereof at the time of their election. They must be able to speak the Tewa language fluently and speak, read, and write the English language, and it will be preferable to have those who can also understand the Spanish language.

Sec. 4. *Qualifications of the Interpreter.*—The interpreter shall be not less than twenty-five (25) years of age, and

not over sixty-five (65) years of age, and must be a member of the pueblo of Santa Clara and a resident thereof at the time of his election. He must be able to speak the Tewa language fluently and to translate the said language into English and Spanish and the English and Spanish languages into the Tewa language.

Article III.—Conduct of Council Meetings

Section 1. *Regular meetings.*—Regular meetings of the pueblo council shall be held at least once a month, at such time and place as shall be fixed by the council, and special meetings shall be held at such times and places as shall be fixed by the council. No action shall be taken by the council at any meeting unless at least a majority of the members are present.

Sec. 2. *Attendance of council members.*—Every member of the pueblo council shall be required to be present at each regular monthly meeting and at each special meeting of the pueblo council unless it should be impossible for such member to be there, in which event said member shall notify the Governor of his inability to attend, giving reasons therefor. The Governor will then refer the matter to the pueblo council who, if the reasons given are found to be justifiable, shall excuse the absence of the said member. In the event that members of the council receive compensation for their services from the pueblo funds, as unexcused absence shall be punished by a fine to be fixed by the pueblo council.

Sec. 3. *Matters of general interest to pueblo.*—In all matters in which all of the people of the pueblo of Santa Clara are interested, the pueblo council shall cause the sheriff to notify all members of the pueblo of the time and place at which such business is to be transacted. At least three days' notice of such general meeting of the pueblo council shall be given in such manner as shall be prescribed by the bylaws of the pueblo. If any member of the pueblo wants a special meeting for all the people in the pueblo, he

will first get permission from the pueblo council through a representative, or through the Governor.

Sec. 4. *Special meetings on grievances.*—If any member of the pueblo of Santa Clara has any grievance against any other member of the said pueblo which cannot await settlement at the regular pueblo council meeting, he shall report the same to the Governor who, if he deems that the case requires speedy attention, shall call a special meeting of the council at such time and place as the Governor shall fix, to pass upon the said matter.

Sec. 5. *Advice of counsel.*—If any cause cannot be fully understood by the pueblo council, the pueblo council may consult the special attorney for the Pueblo Indians and ask for his advice.

Artice IV—Personal Liberties

Section 1. *Private rights of each member of the pueblo.*—Each member of the pueblo of Santa Clara shall be assured his private rights as a citizen of the United States, and no attempt shall be made by the officers of the pueblo to enforce any order upon him depriving him of said rights.

Sec. 2. *Preference to relatives.*—Preference to relatives shall not be given by council members under any circumstances. If they clearly show preference they will be exposing themselves to impeachment.

Sec. 3. *Old members of the pueblo.*—All members of the pueblo who have completed their 75th year shall not be compelled to work on community work (pueblo cleaning, fencing, etc.), and ditch work. If, however, they of their own accord attend to community work they will free to work as they please.

Retired members will not, however, be able to fill the places of sons who are of working age and not justified in refusing to serve on community work and ditch work.

Article V—Intoxication

Any person showing signs of intoxication will not be allowed to take part in a council meeting. Council members who attend meetings while intoxicated or who have missed a meeting because of intoxication will face a charge of impeachment.

All liquor charges will be decided by the pueblo council and fines will be made by the council when cases come up before the council.

Article VI—Stock

From March 1 to November 1 of each year it shall be the duty of all members of the pueblo to report all loose animals found in cultivated fields of the pueblo to the Governor. The Governor will then notify the owners. If they do not remove the animals from the fields at once, they will be subject to a fine. The fine will be made according to the amount of damage done. If the Governor cannot by himself settle a question like this he will be free to bring the case before the pueblo council.

Article VII—Ratification

This constitution and bylaws, when ratified by a majority vote of the members of the pueblo over twenty-one years of age at a special election, called by the Secretary of the Interior, in which at least thirty percent (30%) of the eligible voters shall vote, shall be submitted to the Secretary of the Interior for his approval and shall be effective from the date of such approval. The constitution and bylaws of the pueblo may thereafter be amended or revoked in the manner provided under article VIII of the constitution.

Certification of Adoption

Pursuant to an order, approved November 23, 1935, by the Secretary of the Interior, the attached constitution and by-laws was submitted for ratification to the Indians of the

Santa Clara pueblo and was on December 14, 1935, duly adopted by a vote of 145 for and 8 against, in an election in which over 30 per cent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the act of June 15, 1935 (Pub., No. 147, 74th Cong.).

PATRICI GUTIERREZ,
Chairman of Election Board.
CLETO TAFOYA,
Secretary of Election Board.

NESTOR NARANJO.
JOHN NARANJO.
ANASTACIO NARANJO.
AGAPITO NARANJO.
JOSE NARANJO.
JOSEPH FILARIO TAFOYA.
S. D. ABERLE,
Superintendent in charge the United Pueblos Agency.

I, Harold L. Ickes, the Secretary of the Interior of the United States of America, by virtue of the authority granted me by the act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached constitution and by-laws of the pueblo of Santa Clara.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said constitution or by-laws are hereby declared inapplicable to the pueblo of Santa Clara.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said constitution and by-laws.

Approval recommended December 18, 1935.

JOHN COLLIER,
Commissioner of Indian Affairs.

HAROLD L. ICKES,
Secretary of the Interior.
[SEAL]

WASHINGTON, D. C., *December 20, 1935.*

AMENDMENT—CONSTITUTION AND BY-LAWS OF THE PUEBLO OF SANTA CLARA, NEW MEXICO

AMENDMENT I. Section 2 of Article III shall be amended to read:

"Within the first five days of each year an election shall be held within the Pueblo of Santa Clara, at which a Governor, Lieutenant Governor, secretary, treasurer, interpreter, and sheriff shall be elected by secret ballot to serve for the ensuing year."

I, Oscar L. Chapman, the Assistant Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached Amendment I, amending Section 2 of Article III of the Constitution and By-laws of the Pueblo of Santa Clara, New Mexico.

Approval recommended December 27, 1939.

F. H. DAIKER,
Assistant to the Commissioner.

OSCAR L. CHAPMAN,
Assistant Secretary of the Interior.

[SEAL]

WASHINGTON, D. C., *December 29, 1939.*

CERTIFICATION OF ADOPTION

Pursuant to an order, approved November 21, 1939 by the Assistant Secretary of the Interior, the attached Amendment to the Constitution and By-laws of the Pueblo of Santa Clara was submitted for ratification to the qualified voters of the Pueblo, and on December 19, 1939 was adopted by a vote of 124 for, and 12 against in an election in which more than 30 per cent of those entitled to vote cast their ballots in accordance with section 16 of the Indian Reor-

ganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

JOSEPH F. TAFOYA,
Governor, Pueblo Council of Santa Clara.

ALLAN LAFLIN.
Acting Superintendent, United Pueblos Agency.

250316—40

THE 1939 ORDINANCE

December 15, 1939

Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo.

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. That children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

Supreme Court, U. S.
FILED
DEC 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-682

SANTA CLARA PUEBLO, et al.,
Petitioners,

v.

JULIA MARTINEZ, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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December 1976

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-682

SANTA CLARA PUEBLO, et al.,
Petitioners,

v.

JULIA MARTINEZ, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

Respondents Julia and Audrey Martinez respectfully submit the following brief in opposition to certiorari. This brief addresses the petition for certiorari, received by respondents' counsel on November 17, 1976; the proposed *amici curiae* brief of the Shoshone and Arapahoe Tribes etc., et al., received on December 1, 1976; and the proposed *amici curiae* brief of the Seneca Nation etc., et al., received on December 8, 1976. On December 15, 1976, the Clerk of the Court granted respondents' motion for an extension of time in which to file this brief until January 5, 1977.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 540 F.2d 1039 (10th Cir. 1976). The District Court's opinion is reported at 402 F.Supp. 5 (D.N.Mex. 1975).

QUESTIONS PRESENTED

1. Do the federal district courts have subject matter jurisdiction over an action to determine whether a tribal membership ordinance conflicts with the equal protection and due process guarantees of the Indian Civil Rights Act?

2. Does the Indian Civil Rights Act abrogate the immunity from suit of an Indian tribe in cases arising under the Act?

3. Did the Court of Appeals apply the correct legal standard under the Indian Civil Rights Act to the facts of this case?

STATEMENT OF THE CASE

Pursuant to Rule 40.3, respondents' statement is limited to those points necessary to correct inaccuracies and omissions in the Petition.

Respondent Julia Martinez is a full-blooded Santa Clara Indian and a member and lifelong resident of the Pueblo. Her husband, Myles Martinez, is a full-blooded Navajo Indian and has resided at the Santa Clara Pueblo since his 1941 marriage to Julia, except for his military service in World War II. Their children, respondent Audrey Martinez and her brothers and sisters, are thus of 100 per cent Indian ancestry and 50 per cent Santa Clara ancestry. They are lifelong Pueblo residents except for time away at school. All the Martinez children speak and understand Tewa, the traditional and official language of the Pueblo; practice traditional customs; and are accepted into the ancient religion of the Pueblo.

These facts led the district court to find that the Martinez children "are culturally, for all practical purposes, Santa Clara Indians." Petition page 26a (402 F.Supp. at 18). The Court of Appeals concluded that they "are, culturally, members of the Pueblo." Petition page 31a (540 F.2d at 1041).

The 1939 Pueblo Ordinance denies Pueblo membership to the Martinez children. As a result they are unable to obtain land use rights, in particular to receive a gift or devise of their mother's house and land. They are also denied all rights to vote or participate in Pueblo political life. Most importantly, the Pueblo's written constitution specifies that only members have the right to remain at the Pueblo. R. vol. I, p. 97. At present the children reside with their mother, but if she predeceases them, they face expulsion from their cultural homeland.

By contrast the 1939 Ordinance requires membership of male-line children, even if they are only half Indian or less; even if they have never lived at the Pueblo; and even if they know nothing of its language or religion. Actual examples of these situations appear in the record. Petition page 26a (402 F.Supp. at 18).

At trial, petitioners contended that the 1939 Ordinance is essential to the traditional Pueblo religion, but the district court expressly found to the contrary. Petition page 21a (402 F.Supp. at 16). Petitioners also contended that the 1939 Ordinance merely codified an ancient rule. However, the Pueblo's written constitution of 1935 states that membership for children of mixed marriages would be dealt with on a case by case basis; no discrimination is mentioned. Also, the record is replete with evidence that in fact this was the practice prior to 1939 (and prior to 1935), and that in a number of cases female-line children became members prior to 1939. Petition page 44a (540 F.2d at 1047); Petition page 21a (402 F.Supp. at 16). It is also clear that the reasons for this new rule were economic, to reduce the claimants to Pueblo land and money. Petition page 44a (540 F.2d at 1047); Petition page 20a (402 F.Supp. at 15).

Petitioners allege several points that are misleading. They claim that the Martinez children now enjoy federal services

available to Indians. This is true as far as it goes, and the district court did so find. However, prior to 1968 they were denied such services, and it was only the terminal illness of the Martinez' deceased daughter Natalie which persuaded federal officials to allow them health services despite lack of tribal membership. R.Tr. pp. 15-17, 46-48, 50-51. Also, they could be denied benefits in the future, since benefits are often tied to tribal membership. Petition page 44a (540 F.2d at 1047).

Petitioners also claim that the Martinez children enjoy "all material rights" of members. Petition page 9. This is plainly false as regards the all-important rights to use Pueblo land, to inherit their mother's home, and to remain at the Pueblo after her death. The evidence showed only that non-member residents of the Pueblo are usually permitted to hunt, gather firewood, and the like.

Petitioners state that Julia Martinez was "aware of the consequences" if she married a non-member. What the cited evidence shows is that Mrs. Martinez had been told of the "paper" on this subject, that is, the 1939 Ordinance, which was two years old at the time of her marriage. Other evidence showed that in 1942 the Pueblo contemplated exceptions to the Ordinance upon payment of a fee (Plaintiffs' Trial Exhibit 15). The 1939 Ordinance had not yet hardened into the irrebuttable presumption of today.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS ON THE JURISDICTIONAL ISSUES URGED BY PETITIONERS

Petitioners question generally the subject matter jurisdiction of the district court; they urge that the Santa Clara Pueblo is immune from suit; and they contend that there is

no federal court jurisdiction over tribal membership questions in particular. Petition pages 10-17. Petitioners do not contend that there is a conflict between the circuit courts of appeals on any of these questions. However, a proposed *amici* brief appears to argue such a conflict. Brief *Amici* of the Seneca Nation etc., et al., at page 9, footnote 4. This assertion is incorrect. All circuit courts of appeals which have addressed the Indian Civil Rights Act have agreed on these jurisdictional issues and have sustained federal court jurisdiction.

A. *Subject Matter Jurisdiction.*

Four circuits have sustained jurisdiction pursuant to 28 U.S.C. § 1343 and/or § 1331 to hear cases arising under the Indian Civil Rights Act, provided that internal remedies within the tribal government are first exhausted.[1] *Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698, 699 (8th Cir. 1972); *Daly v. United States*, 483 F.2d 700, 704 (8th Cir. 1973); *Brown v. United States*, 486 F.2d 658, 661 (8th Cir. 1973); *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200, 203 (9th Cir. 1973); *Laramie v. Nicholson*, 487 F.2d 315 (9th Cir. 1973), *cert. denied*, 419 U.S. 871; *Thompson v. Tonasket*, 487 F.2d 316 (9th Cir. 1973), *cert. denied*, 419 U.S. 871; *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233, 236 (9th Cir. 1976); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1233 (4th Cir. 1974); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 933 (10th Cir. 1975). *See also, Seneca Constitutional Rights Org. v. George*, 348 F.Supp. 48, 50 (W.D.N.Y. 1972).

B. *Tribal Immunity from Suit Abrogated.*

The same four circuits have ruled that the Indian Civil Rights Act is an exception to tribal immunity from suit and

---

[1]It is undisputed here that Julia Martinez has unsuccessfully sought to have her children enrolled since 1946 and has thus exhausted all tribal remedies. Petition pages 10a-11a (402 F.Supp. at 10-11).

abrogates that immunity in cases where the Act applies. *Daly v. United States, supra,* 483 F.2d at 705; *Brown v. United States, supra,* 486 F.2d at 661; *Means v. Wilson,* 522 F.2d 833, 841 (8th Cir. 1975); *Johnson v. Lower Elwha Tribal Community, supra,* 484 F.2d at 202; *Laramie v. Nicholson, supra; Thompson v. Tonasket, supra; Howlett v. Salish and Kootenai Tribes, supra,* 529 F.2d at 236; *Crowe v. Eastern Band of Cherokee Indians, Inc., supra,* 506 F.2d at 1233; *Dry Creek Lodge, Inc. v. United States, supra,* 515 F.2d at 934. *See also, Seneca Constitutional Rights Org. v. George, supra,* 348 F.Supp. at 50.

C. *Tribal Membership Is Subject to the Indian Civil Rights Act.*

The Indian Civil Rights Act expressly imposes its standards on *"all* governmental powers possessed by an Indian tribe, executive, legislative, and judicial . . . " 25 U.S.C. § 1301(2) [emphasis added]. Accordingly, the two circuits which have ruled on membership cases arising under the Act (9th and 10th), as well as the Interior Department, have applied the Act to membership questions.

The other circuit court of appeals to rule on a tribal membership case sustained federal court jurisdiction, and this Court denied review. *Laramie v. Nicholson,* 487 F.2d 315 (9th Cir. 1973), *cert. denied,* 419 U.S. 871; *Thompson v. Tonasket,* 487 F.2d 316 (9th Cir. 1973), *cert. denied,* 419 U.S. 871.

The Interior Department also interpreted the Indian Civil Rights Act to extend to tribal membership questions. In 76 I.D. 353 (1969), the Interior Solicitor disapproved a tribal membership law as being repugnant to 25 U.S.C. § 1302(8). This decision was issued shortly after enactment of the Indian Civil Rights Act, and the Interior Department played a major role in the proceedings leading to its enactment.

II. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD TO THE FACTS OF THIS CASE.

A. *Petitioners and Amici Ignore the Facts.*

The Petition and the two proposed *amici* briefs argue with virtually no attention to the facts of this case. The facts about the Martinez children led the district court to conclude that they "are culturally, for all practical purposes, Santa Clara Indians." Petition page 26a (402 F.Supp. at 18). The Court of Appeals likewise concluded that the Martinez children "are, culturally, members of the Pueblo." Petition page 31a (540 F.2d at 1041). Significantly, these findings are not in any way questioned by petitioners or proposed *amici.*

It is also undisputed that the Martinez children cannot inherit their mother's house at the Pueblo and face explusion from their homeland should she predecease them.

Despite these facts, petitioners' sole justification for the ordinance is alleged cultural survival. They even rely on testimony by the Pueblo Governor that without the ordinance, they would suffer an influx of unknown outsiders (Petition page 28) — a claim that is ludicrous when measured against the Martinez family's situation.

The Court of Appeals rightly concluded that the Pueblo "has not shown how such an incongruous and unreasonable result fosters and promotes cultural survival." 540 F.2d at 1047.

The importance of the point made here was identified in an early law review commentary on the Indian Civil Rights Act. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments,* 82 Harv.L.Rev. 1343 (1969).[2] This Note distinguishes between cultural "out-

[2]Both petitioners and proposed *amici* Seneca Nation etc., et al., cite to and rely on this Note.

siders" and persons "within the cultural group" who "have been allowed to develop a substantial stake in it" and are "ethnically related to the tribe," and argues that the latter should be protected by the Act. 82 Harv.L.Rev. at 1363.

Respondents do not dispute the Pueblo's right to exclude *true* outsiders or to pass rules actually related to cultural survival. But no such rules are at issue here.

These considerations also bear on the claim that this decision will have an important impact on other Indian tribes. While the claim is made that a few other tribes have male-line or female-line traditions, there is no showing that any other tribe applies a rigid rule of this kind to expel cultural insiders. For example, the Navajos and western Pueblos have very strong female-line traditions, but these have no bearing on tribal membership. Respondents suggest that the facts of this case are unique.

These facts reveal two kinds of discrimination: Julia Martinez is denied rights accorded her male counterparts and thus suffers discrimination on the basis of her sex. Audrey Martinez and her four brothers and three sisters suffer ancestry discrimination, being denied rights accorded male-line children otherwise identically situated. Furthermore, the alleged need for the rule, cultural preservation, creates an irrebuttable presumption of cultural identity, a presumption which the Martinez children obviously belie.

This Court has repeatedly condemned unjustified governmental rules in each of these three categories. As to sex discrimination, *see Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). Ancestry discrimination of many kinds has been condemned. *See, e.g., Hernandez v. Texas*, 347 U.S. 475 (1954); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Finally, permanent presumptions were condemned in *Stanley v. Illinois*, 405 U.S. 645 (1972); *Vlandis v. Kline*,

412 U.S. 441 (1973); and *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974).

A lower court decision involving issues similar to the instant case is *Samuel v. University of Pittsburgh*, 375 F.Supp. 1119 (W.D.Pa. 1974), *appeal dismissed*, 506 F.2d 355 (3d Cir. 1974).

B. *There Is No Conflict Among the Circuits on the Legal Standard to Be Applied.*

Both of the proposed *amici* briefs suggest that the interpretation of the Indian Civil Rights Act by the Court of Appeals differs from the interpretation of the Act by the 8th and 9th Circuits. Brief *Amici* of the Shoshone and Arapahoe Tribes, etc., et al., at page 5; Brief *Amici* of the Seneca Nation, etc., et al., at page 13. However, this assertion will not withstand analysis.

The cases from the 8th and 9th Circuits, as well as those from the 10th, all agree that the tribal interest in cultural autonomy is entitled to consideration in an Indian Civil Rights case; that it is to be weighed against the individual interest involved; and that this creates differences from the application of the 14th Amendment to the States in some cases. But the language of 25 U.S.C. § 1302(8) is identical to the corresponding language of the 14th Amendment, and all the circuit courts have recognized the obvious affinity of the two laws. *See* generally the cases cited above at pages 5-6.

Amici select two cases where circuit courts sustained tribal rules to argue their conflict claim. However, these cases are based on very different facts from the instant case, and the legal analysis is in fact similar. In *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976), the court sustained a tribal law requiring one year residency on the reservation to be eligible to run for a tribal office. However,

the court clearly exercised its jurisdiction to weigh the tribal interest against the individual interest, just as the court below did. In *Howlett*, the court noted that the harm to the individual must be weighed in deciding whether to depart from 14th Amendment standards:

> Where the strict application of traditional equal protection doctrines would significantly impair a tribal practice or alter a custom firmly embedded in Indian culture, *and where the individual injury alleged by the tribal member is, by comparison, not a grievous one,* then the equal protection clause at 25 U.S.C. § 1302(8) may be implemented somewhat differently than its constitutional counterpart.

529 F.2d at 238 [emphasis added]. The court later noted that "plaintiffs are not barred from becoming eligible candidates in the future. Their candidacy is only delayed — not barred." 529 F.2d at 244. The court also found a compelling governmental interest to sustain the tribe's rule, using analysis much like that in 14th Amendment cases. By contrast, the harm to the Martinez children is obviously vastly greater, as they face expulsion from their cultural homeland.

The other case relied on, *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973), imposed reapportionment upon the tribal council under 14th Amendment standards but sustained a minimum blood quantum (half Indian ancestry) rule. Discrimination in favor of persons of a certain degree of Indian blood is, however, a uniquely compelling interest of Indian tribes, and it has been sustained under the Fifth Amendment. *See, Morton v. Mancari*, 417 U.S. 535 (1974). It is so recognized in the history of the Indian Civil Rights Act and by the courts, including the court below. *See, e.g.*, Note, 82 Harv.L.Rev. 1343, 1362 (1969). The *Daly* court sustained the blood quantum rule on the finding of a "significant cultural interest" of the Tribe, a form of analysis similar to that employed in 14th Amendment cases and differing only in the nature of the interests found to justify a discrimination.

C. *Legislative History.*

The Congressional intent behind the legislation which became the Indian Civil Rights Act of 1968 was clearly stated by its chief sponsor, Senator Sam Ervin:

> The purpose of S. 1843, as amended, is to insure that the American Indian is afforded the broad constitutional rights secured to other Americans. The purpose of Title I [25 U.S.C. §§ 1301-1303] is to protect individual Indians from arbitrary and unjust actions of tribal governments. This is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government. *These limitations are the same as those imposed on the United States by the U.S. Constitution and on the States by judicial interpretation.*

S.Rep. No. 841, 90th Cong., 1st Sess. 5-6 (1967) [emphasis added]. *See also* S.Rep. 721, 90th Cong., 2d Sess., 1968 U.S. Code Congr. & Admin. News pp. 1863-1865.

By contrast petitioners and proposed *amici* rely primarily on reports of some of the hearings on the various bills that led to passage of the Act. Some of the witnesses at these hearings actually opposed passage of the Act, as the court below noted in its analysis of this subject. Petition page 39a (540 F.2d at 1045). Plainly, their view was rejected by Congress.

D. *Petitioners' Proposed Interpretation Would Reduce § 1302(8) to a Nullity.*

Petitioners urge a very restricted interpretation of § 1302-(8), confining it to insuring the "even-handed application"

of tribal laws. Petition pages 27-28. However, this so-called "even-handed application" theory would reduce § 1302(8) to a nullity, because any discrimination, no matter how arbitrary or unjustifiable, can be reduced to a fixed rule. This interpretation would, for example, immunize a tribal law discriminating between blacks and whites.

The sole case relied on for this theory, *Daly v. United States, supra,* does not when fairly read support it. As previously noted, the *Daly* court ordered reapportionment of a tribal council but sustained a tribal minimum blood quantum rule. The court first considered whether there was sufficient tribal governmental interest to justify either tribal action involved. In the case of legislative districting, the court concluded that there was not; in the case of the blood quantum rule, the court concluded that there was. The court went on to note the Tribe's justification would not, however, support unequal application of the blood quantum rule. In other words, the notion of "even-handed application" only appeared after the court had determined that this rule itself was justified. Respondents submit that this is the same analytical process used in 14th Amendment review of a state law. To be sure, the nature of the governmental interests which may justify a discrimination will sometimes differ, but the analysis is the same.

CONCLUSION

Those courts of appeals which have addressed cases arising under the Indian Civil Rights Act have unanimously agreed on federal jurisdiction over such cases, provided that internal remedies within the tribal government are first exhausted (as here). The courts have further agreed on the standards to be applied, giving due consideration to a tribe's governmental interest, which is to be weighed against the individual interest involved. The Court of Appeals in this case applied

these settled rules and correctly concluded that the very serious harm to plaintiffs could not be justified by the "incongruous and unreasonable" tribal interest claimed. For these reasons, review by this Court should be denied.

Dated: December 1976

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO, et al, *Petitioners,*

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR PETITIONERS

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JULIA MARTINEZ, et al, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Federal District Court for the District of New Mexico is reported as *Martinez* v. *Santa Clara Pueblo,* 402 F. Supp. 5 (D.N.M. 1975) and is reproduced in the Appendix to the Petition for Writ of Certiorari, pp. 1(a)-27(a). The opinion of the 10th Circuit Court of Appeals, 540 F.2d. 1039 (10th Cir. 1976) is reproduced as pp. 28(a)-45(a) Appendix to the Petition.

JURISDICTION

The Judgment of the 10th Circuit of Appeals was entered on August 16, 1976.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Indian Civil Rights Act, 25 U.S.C. §§ 1301-3 (1968) § 1301. Definitions.

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "Powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense. (Pub. L. 90-284, title II, § 201, Apr. 11, 1968, 82 Stat. 77):

§ 1302. Constitutional Rights.

No Indian tribe in exercising powers of self-government shall—

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

§ 1303. Habeas Corpus.

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe. (Pub. L. 90-284, title II, § 203, Apr. 11, 1968, 82 Stat. 78).

The 1939 Ordinance

December 15, 1939

Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo.

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. That children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

The Constitution and By-Laws of Santa Clara Pueblo are reproduced in the Appendix.

QUESTIONS PRESENTED

1. Does the Indian Civil Rights Act, 25 U.S.C. §§ 1301-3 (1968) waive the sovereign immunity of Indian tribes from suit in federal courts and thus confer

jurisdiction upon federal courts in matters of tribal membership?

2. Assuming that the Act vests federal courts with jurisdiction to resolve Indian tribal membership disputes, what legal standard of equal protection should be applied to a tribal membership question?

STATEMENT OF THE CASE

Proceedings Below:

The case involves application of Section 1302(8) of the Indian Civil Rights Act to the Santa Clara Pueblo Tribal Membership Ordinance of 1939. Plaintiffs allege that the Ordinance is discriminatory and violates said Section of the Act. Suit was filed on September 22, 1972, in the Federal District Court for the District of New Mexico. The Defendants raised the defenses of lack of jurisdiction, sovereign immunity, failure to exhaust tribal remedies and others. All motions to dismiss were denied by the District Court. Trial to the Court without a jury was held November 25 through 27, 1974 and Judgment for the Defendants was entered on June 25, 1975. The Courts findings and conclusions are contained in its memorandum opinion (pp. 1(a)-27(a)) Appendix to the Petition for Writ of Certiorari, hereinafter referred to as App. to Pet. Notice of appeal was filed by Plaintiffs on July 17, 1975. The 10th Circuit Court of Appeals reversed the trial court and remanded the case for further action on August 16, 1976.

Facts:

Santa Clara Pueblo is a Pueblo Indian Tribe organized pursuant to a constitution under authority of

25 U.S.C. § 476. It covers roughly 48,000 acres which are held by the United States in trust for the Pueblo. Approximately 1200 recognized members and between 150-200 non-members currently live on the Pueblo. Some 150 recognized members live elsewhere, one-third of them in other locations in New Mexico and the rest scattered across twenty-two different States. App. to Pet. p. 14(a). At the time of the trial there were 34 mixed marriages out of a population of approximately 1200. R.p. 141.

Santa Clara Pueblo has been situated on the banks of the Rio Grande at its present location at least three hundred years. R.pp. 234-235. "Since 1680 the Pueblo has existed as a conquered people, identifiable as a group but surrounded by an alien culture, first Spanish and later American". App. to Pet. p. 19(a).

During the 1800's there was a great drop in population in Santa Clara Pueblo because of small-pox and other epidemics which were introduced into the Pueblo area by the Spaniards. The Pueblo people had no resistance to this kind of disease and as a result the population of Santa Clara Pueblo at that time dropped to approximately one hundred people. R.p. 236.

The Pueblo is an Indian tribe with sovereign powers of self-government over its territories and its people. Initially Santa Clara culture made no distinction between what Anglo-Americans would term "political" and "religious" matters. However, with the Spanish invasion in the early 1700 Century, the Pueblo instituted a "secular" government to distract Spanish attention from the *caciques* (religious leaders) who were the real authorities in the Pueblo. The distinction between religious and secular spheres is now well estab-

lished in the Santa Clara culture. App. to Pet. p. 14(a). The District Court found that:

"The membership of the Pueblo is and has been organized into what the anthropologists refer to as "moieties". Specifically the Winter people and the Summer people. Each moiety is lead by a *cacique,* and each is further divided into factions. The precise function and significance of moiety membership is not clear on the record; it is, however, clear that it is primarily a religious grouping. The *caciques* are still the dominant authorities in the Pueblo, nominating the candidates for secular office and exercising an effective veto by influence over the action of the secular government.

The division of the moieties into factions is a relatively recent development. During the early part of the twentieth century sharp conflicts developed in the Pueblo over the importance of traditional customs and values in the life of the Pueblo. For example, a major source of controversy was whether the Governor should be an older, highly respected man who was well versed in the traditional ways, or a younger man, educated in Anglo-American schools, who could speak English and would be able to deal more effectively with non-Pueblo society. The disagreement literally split the Pueblo, and during the late 1920s and early 1930s the Pueblo had two governors, neither of whom recognized the authority of the other, and two separate Winter and Summer moities. The Bureau of Indian Affairs (B.I.A.) staff in Washington offered to arbitrate the dispute. The entire Pueblo agreed that the BIA officials from Washington were irrelevant.

They did agree to have the resident BIA agent, Elizabeth Sargeht, help settle the difference. At her

suggestion, and after much discussion, the Pueblo organized pursuant to the authority of the Wheeler-Howard Act, 25 U.S.C. § 476, and adopted a Constitution and By-Laws in 1935." App. to Pet. pp. 14(a)-15(a).

Santa Clara Pueblo is a Tewa pueblo. Any people who speak the Tewa language are referred to as Tewa Pueblos by anthropologists. Other Tewa pueblos are San Juan, San Ildefonso, Tesuque, Pojoaque and Nambe. There were other Tewa pueblos but many died out during the pueblo rebellion in the late 1600s. R.p. 233. Santa Clara Pueblo is a theocracy, or government by religious group, R.p. 241, and patrilineal. "Patrilineal refers either to inheritance through the father's side as in our own society, which we would call patrilineal, and/or the inheritance of other matters or the following in other matters of the father's side." R.p. 243.

The Governor is the chief executive of the Pueblo charged with enforcing the law civil and criminal, written or unwritten *Santa Clara Constitution,* Art. V; *Santa Clara By-Laws,* Art. 1, Sec. 1. In addition the Governor appears to have the initial responsibility for settling controversies among and concerning the members of the Pueblo. A person aggrieved by a ruling of the Governor may appeal to the Council, at which time the Governor may vote only to break a tie. *Santa Clara Constitution,* Art. IV, Sec. 2.

All other secular governmental power and responsibility is vested in the Council, including the power to enact ordinances governing Pueblo life, *Santa Clara Constitution,* Art. IV. Sec. 1(5). Most important for the present case, the Constitution specifically grants

the Council the power to determine which children of mixed marriages shall be recognized as members of the Pueblo, Art. II. Sec. 1(c). and to determine who is a member for purposes of dealings in land and land use rights, Art. VII, Sec. 1. The 1939 Ordinance was enacted by the Council pursuant to these powers; and is agreed by all parties to be in force at this time. App. to Pet. p. 16(a).

Plaintiff, Julia Martinez, is a member of the Pueblo, as were both of her parents. Her husband, Myles Martinez, is a Navajo Inian, R.p. 346. The Martinez' have lived at Santa Clara Pueblo since 1941 with the exception of a period when Mr. Martinez was in the military service. The Martinez' have raised ten children on the Pueblo, eight of whom are living. Plaintiff, Audrey Martinez, is the eldest daughter of the Martinez'. All of the Martinez children speak and understand Tewa, the traditional language of the Pueblo. The children were raised at the Pueblo and made it their home except for periods away at school. App. to Pet. p. 17(a). These children are presently barred from Pueblo membership by the Ordinance of 1939. They can, however, be enrolled in the Navajo Nation if they desire. R.p. 22.

The Martinez children now live on land belonging to their mother, which she is prohibited from conveying to any person who is not a member. Contrary to the position taken by Plaintiffs it is not at all clear that the Martinez children face expulsion from Santa Clara Pueblo in the event that their mother should predecease them. R.p. 112. The Pueblo holds all of the land within the Pueblo's boundaries in fee simple title in common. Individual members, however, are granted

possessory interest in tracts of land which they may pass on to their descendants. The devolution of the possessory interests does not diminish the Pueblo's superior proprietary right. App. to Pet. p. 31(a). Nonmembers are not allowed to vote in Pueblo elections and they are not allowed to hold office as secular officials of Santa Clara Pueblo. App. to Pet. p. 17(a).

The lack of tribal membership does not in any way affect the Martinez' entitlement to participate in federal benefits accorded Indians generally. App. to Pet. p. 18(a). All the Martinez children are entitled to full benefits from the Bureau of Indian Affairs regardless of their lack of membership in the Santa Clara Pueblo. Plaintiff, Audrey Martinez, who was twenty-seven years old at the time of trial, has attended college for six or eight semesters on federal grants. R.p. 82-85. The children all have census numbers and are receiving complete medical and educational benefits. R.pp. 25, 61-63. The Martinez children have all the material rights that full members of the Santa Clara Pueblo have, except the right to vote or own land. R.p. 64. Even Mr. Martinez, a Navajo, has privileges that members have, such as irrigation water, farming, wood-hauling, fishing and hunting, R.P. 15.

Santa Clara Pueblo has consistently taken the position that the 1939 Ordinance is simply a written embodiment of a preexisting unwritten rule of membership that has been in existence from time immemorial. R.p. 109, 153, 208 and further that the Ordinance is essential to the cultural and religious heritage that is vital to the Tribe's existence. R.p. 117.

Mrs. Julia Martinez was fully aware of the consequences if she married a non-Santa Clara male. R.p.

63. She was told by her uncle that if she married a non-member of Santa Clara Pueblo her children could not be enrolled. Several other witnesses testified that they had been told of the consequence of marriage by a Santa Clara woman to a non-Santa Clara male by the tribal elders. R.pp. 108, 155, 179, 207. There was no testimony to the contrary.

There is no actual membership roll as such. R.p. 111. Julia Martinez has attempted to enroll her children in the Pueblo since 1946. The district court found that the Martinez' exhausted all remedies within the tribal system.

The record fails to show that the Pueblo has varied from the Ordinance under attack, there having been no exceptions to the Ordinance since its enactment. The district court ruled that "the 1939 Ordinance does not violate the restrictions of 25 U.S.C. §§ 1302(8) and Plaintiffs have not been denied the equal protection of the laws within the meaning of the Indian Civil Rights Act". App. to Pet. p. 25(a).

The district court's Memorandum Opinion was filed June 25, 1975. On July 17, 1975, the Plaintiffs filed their Notice of Appeal to the 10th Circuit and on August 16, 1976, the 10th Circuit of Appeals entered judgment reversing the lower court and remanding the case for further proceedings.

SUMMARY OF ARGUMENT

The Federal courts do not have jurisdiction of this case which involves the legality of the 1939 Tribal Membership Ordinance of the Santa Clara Pueblo. Santa Clara Pueblo is immune from suit in Federal

courts. This immunity is based on the sovereignty of Indian tribes and has long been recognized by the judicial branch. Through Congress has plenary power over Indian tribes and can waive sovereign immunity it has not done so.

The Indian Civil Rights Act does not give Federal courts jurisdiction over Indian tribes. The legislative history of the Indian Civil Rights Act makes it clear that Congress did not intend to waive tribal sovereign immunity. It was the intent of Congress that Federal courts have jurisdiction only over habeas corpus matters to protect the civil rights of Indian criminal defendants.

Assuming that the Federal courts have jurisdiction over this case, the strict equal protection standards of the Fourteenth Amendment to the United States Constitution are not applicable to this question of tribal membership.

If a Fourteenth Amendment standard is applied at all, it should be a rational relation test and not the compelling interest test applied by the Tenth Circuit.

The record of the district court proceedings show clearly that the very existence of the Tribe as an independent entity is dependent upon the validity of the Tribal membership ordinance. This objective passes scrutiny under either the compelling interest or rational-relation tests and as long as the tribal membership ordinance is applied in the even-handed non-discriminatory manner which it has been, it should be upheld.

The issue of tribal membership is closely analogous to that of naturalization of citizens by the United

States. The United States has absolute discretion, through Congress, to determine requirements for naturalization. Indian tribes have the same absolute discretion to determine requirements for enrollment in the tribe. The Courts should therefore apply the same standards to Indian membership questions that they apply to naturalization cases. This test is a very limited scope of judicial inquiry with the courts zealously avoiding substituting their political judgment for that of the tribes.

ARGUMENT

The Indian Civil Rights Act Does Not Waive The Sovereign Immunity Of Indian Tribes To Suit In Federal Courts And Does Not Confer Jurisdiction Upon Federal Courts In Matters Of Tribal Membership.

Santa Clara Pueblo is immune from suit in federal courts absent express congressional action authorizing jurisdiction. The United States Constitution treats Indian tribes on the same level as states and foreign nations. Art. I, Sec. 8. Cl. 3.

Indian tribes, such as Santa Clara Pueblo, which are recognized by the Federal Government are exempt from suit in Federal courts without express congressional authorization. *United States* v. *United States Fidelity Company,* 309 U.S. 506, (1940); *Twin Cities Chippewa Tribal Council v. The Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967). Furthermore, statutory authority required to subject a tribe to jurisdiction of the federal courts must be "expressed in plain and unambiguous terms", *Thebo* v. *Choctaw Tribe of Indians,* 66 F. 372 (8th Cir. 1895); *Native American Church, etc.,* v. *Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959).

The Indian Civil Rights Act contains no language indicating that it "expressly" waives the sovereign immunity of tribes, nor does it specifically grant jurisdiction in federal courts for actions against Indian tribes. The principal that waiver of sovereign immunity must be founded upon express language and cannot be based upon implication has been reaffirmed in recent cases. *United States* v. *King,* 395 U.S. 1 (1969); *Hamilton* v. *Nakai,* 453 F.2d 152 (9th Cir. 1972).

Though Congress has never expressly waived sovereign immunity of Indian tribes from suits in federal courts by conferring jurisdiction upon the courts to determine tribal membership questions, the 10th Circuit Court of Appeals ignored this issue. In holding that 28 U.S.C. § 1343(4) provides the requisite jurisdictional basis the Court ruled contrary to prior holdings of this Court. *United States* v. *United States Fidelity Co.,* supra; *Roff* v. *Burney,* 168 U.S. 218 (1897); *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, (1903).

This Court teaches in *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973), that statutes concerning Indians must be read against a backdrop of the Doctrine of Tribal Sovereignty. "It must always be remembered that the various Indian tribes were once independent and sovereign nations and that their claim to sovereignty long predates that of our own Government." at 172. The Court in *McClanahan* quoted from *United States* v. *Kagama,* 118 U.S. 375, 381-382 (1886)—"they (Indian tribes) were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as Nations, not as possessed of the full attributes of sovereignty, but as a separate people, *with the power of regulating their internal and social rela-*

tions, and thus far not brought under the laws of the Union or of the State within whose limits they resided." (emphasis added). See also *United States* v. *Mazurie,* 419 U.S. 544, 557 (1975).

The most basic and fundamental sovereign right of any Indian tribe is its complete and absolute authority to determine all questions of its own membership as a political entity. The power of an Indian tribe to determine with total authority, all questions of its own membership including the power to revoke rights of membership which it has granted has been recognized by the Supreme Court. *Roff* v. *Burney,* supra; *Martinez* v. *Southern Ute Tribe of the Southern Ute Reservations,* 249 F.2d 915 (10th Cir. 1957). The trial court recognizing the importance to the tribe of having the authority to decide its membership stated; "Membership policies present the same interests on a different level. They are no more or less than a mechanism of social, and to an extent psychological and cultural, self-definition. The importance of this to Santa Clara or to any other Indian tribe cannot be overstressed. In deciding who is and who is not a member, the Pueblo decides what it is that makes its members unique, what distinguishes a Santa Clara Indian from everyone else in the United States. If its ability to do this is limited or restricted by an external authority, then a new definition of what it is to be a Santa Claran is imposed and the culture of Santa Clara is inevitably changed." App. to Pet. p. 20(a).

Federal courts have never been granted express jurisdiction by Congress to consider tribal membership questions. Accordingly, the Supreme Court held in *Lone Wolf* v. *Hitchcock,* supra, at P. 172. "Plenary

authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

It is clear that prior to the passage of the Indian Civil Rights Act, federal courts did not have jurisdiction over Tribal enrollment matters. *Martinez* v. *Ute Tribe,* supra. Felix S. Cohen in Cohen, *Handbook of Federal Indian Law,* p. 133, (1942) stated:

> "The Courts have consistently recognized that in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership. . . .
>
> The power of an Indian tribe to determine questions of its own membership derives from the character of an Indian tribe as a distinct political entity."

In dealing with a fundamental sovereign right such as membership of a tribe, Congress should speak with a loud and clear voice. This Congress has failed to do.

The Legislative History of the Act

The legislative history shows no indication that Congress intended to waive sovereign immunity of Indian tribes from suit in federal courts. Congress in order to protect civil rights of members of Indian tribes decided to strengthen tribal governments and tribal institutions. Testimony before the Ervin Committee indicated that Indian tribes lacked certain civil rights protections, many tribes not having constitutions or other formal governments.

Section § 1303 of the Act is the only section which vests jurisdiction in the federal courts, and it is limited to testing the legality of detention by tribal authority. After rejecting earlier drafts of the Act which would have provided de novo review of all criminal actions of tribal courts, Congress nevertheless felt that deprivation of personal liberty was of sufficient importance to require the carving out of an additional page of jurisdiction in federal courts. But even here, Congress did not waive sovereign immunity of Indian tribes from suit in federal courts because habeas corpus proceedings are actions directed only at officials who have custody of defendants, and not tribes per se. This section does not authorize actions against Indian tribes themselves but provides only a mechanism to prevent illegal detention of criminal defendants.

The legislative history of the Act supports Petitioners' position. In none of the hearings held upon the Act from 1961 through 1965 was there one word intimating that the Act would waive tribal sovereign immunity, or would vest the federal courts with jurisdiction over questions of tribal membership.

Frank J. Berry, Solicitor of the Department of the Interior during hearings prior to passage of the Act recognized that:

> "On the other hand, the people of Indian tribes have their roots in an entirely different culture and it may be that the devices which appropriately protected the interests of the Anglo-American of the late 18th Century may not be appropriate to protect the Indian tribal member of the middle 20th Century. *Hearings on S. 961-68 and S.J. Res. 40 to Protect the Constitutional Rights of American Indians before the Subcommittee on Constitutional rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess.* (1965) p. 17."

Senator Ervin himself expressed Congress' concern for protecting Indian self-government and cultural values stating:

> "The essential problem that confronts the Congress in this field is whether or not it is possible to establish a relationship with our other levels of government for the reservation Indians in a way that will harmonize with our levels of government and yet at the same time preserve for them such necessary local self-government as would seem to best serve their interest. *Hearings on S.J. Res. before the Sub-committee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., Part 1* (1961) p. 19."

Congress did not intend that 25 U.S.C. § 1302 allow invasion by the federal courts into the areas of the essential political structure of Indian tribes. The Act incorporates only selected portions from the federal bill of rights contained in the first ten amendments, and subsection (8) contains an edited version of the language of the 14th Amendment. Nowhere are privileges and immunities of citizens mentioned, nor is any mention made in the Act of the right to vote.

Since determination of membership is an essential political attribute of an Indian tribe, 25 U.S.C. § 1302 should not be construed as having taken that right from the Indian tribes by implication and to have conferred it sub-silentio upon the federal courts.

It should be noted that S. 962, the earlier version of 25 U.S.C. § 1303, vested the federal district courts with jurisdiction to hear appeals from criminal convictions

in tribal courts de novo by a judge and a jury. These provisions were removed however and federal courts were vested with only limited jurisdiction over habeas corpus proceedings. Senator Ervin himself recognized this limited effect of the Act:

> SENATOR ERVIN: This bill does not provide for the Federal courts to review all the decisions of the Indian courts. In fact, provision for Federal review was in there originally, and at the request of a number of tribes we eliminated that entirely. *The only provision in this bill that provides for Federal court interference is writ of habeas corpus,* and that probably exists as law now, although I am not quite certain. If the man was convicted in violation of a law, the Federal court would have the jurisdiction to issue a writ of habeas corpus. *Hearing on Title II of the Civil Rights Act of 1968 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess.* (1969) p. 15 (Emphasis supplied).

The doctrine of sovereign immunity of Indian tribes is of such long standing and so well known that Congress must have been aware of it. Yet Congress refrained from any declaration, express or implicit, waiving immunity for purposes of the Act. When the entire Act is viewed against a backdrop of tribal sovereignty, it becomes clear that Congress chose to proceed in a deliberate manner by encouraging tribal self-determination and at the same time preserving the civil rights of tribal members. Congress acted knowing full well that it retained plenary jurisdiction over Indian tribes and that if tribal courts and tribal councils failed to protect the civil rights of tribal members, the Congress could take the more drastic step of vesting the federal courts with additional jurisdiction.

Until Congress takes such additional steps, it is wholly unwarranted for the federal courts to conclude that Congress has inferentially waived tribal sovereign immunity. It is especially dangerous to the continued existence of tribal governments for federal courts to attempt to read 25 U.S.C. § 1302 in conjunction with 28 U.S.C. § 1343(4) in such manner as to open a Pandora's box of litigation against Indian tribal governments. Yet this is exactly what the 10th Circuit Court of Appeals has done.

Most Indian tribes are able to continue functioning as sovereign units of government only by conserving their assets and obtaining federal grants for improving and enlarging their governmental functions. Their traditional sovereign immunity from suit in federal courts has protected them from vexatious suits which would literally destroy them. The Court of Appeals' decision striking down tribal sovereign immunity must be reversed in light of the apparent intent of Congress in enacting the Indian Civil Rights Act. In keeping with the rule that tribal sovereign immunity is not likely to be considered abrogated, this legislative history, especially Senator Ervin's statement of his understanding that 25 U.S.C. § 1303 is the only provision in the Act "that provides for federal court interference," appears to be conclusive of Congressional intent.

The 10th Circuit in *Slattery* v. *Arapahoe Tribal Council,* 453 F.2d 278 (10th Cir. 1971), held that the Indian Civil Rights Act was concerned primarily with tribal administration of justice, and the imposition of tribal penalties and forfeitures, and not with the specifics of tribal structure of office holding. Again the 10th Circuit in *McCurdy* v. *Steel,* 353 F. Supp. 629 (D-Utah

1973), rev'd, 506 F.2d 654 (10th Cir. 1974) stated that "Its (the ICRA) guarantees of individual rights should, where possible, be harmonized with tribal cultural and governmental autonomy." p. 633. Nor are the same restraints contained in the equal protection clause of the United States Constitution to be imposed on Indian tribes, *Groundhog* v. *Keeler*, 442 F.2d 674 (10th Cir. 1971).

The courts below have borrowed jurisdictional authority from other Statutes predating the Indian Civil Rights Act and have further borrowed legal doctrines from civil rights cases to authorize unlimited and wholly inappropriate relief. Those Federal courts that have addressed the problem of sovereign immunity of Indian tribes at all have overcome this obstacle by concluding that the Act by implication, sub-silentio abrogates tribal sovereign immunity and that without expressly saying so Congress has conferred jurisdiction for such actions. *Loncassion* v. *Leekity*, 334 F. Supp. 370 (D.N.M. 1971); *Johnson* v. *Lower Elwha Tribal Community*, 484 F.2d 200 (9th Cir. 1973).

As indicated the Act contains no specific provision giving Federal courts general jurisdiction over alleged violations of the Act. The only jurisdictional provision, 25 U.S.C. § 1303 provides jurisdiction "in a court of the United States, to test the legality of his detention by order of an Indian tribe". The Court of Appeals concern that if general jurisdiction were not read into the Act "it would constitute a mere unenforceable declaration of principles", App. to Pet. p 33(a), is not valid as all the provisions of the Act would still have full force and effect in Habeas Corpus cases, and could presumably be raised in any action by the tribes against individuals.

The Court of Appeals in the case at bar recognized that "the Congressional hearings give little attention to Constitutional rights other than protection under the criminal law and procedure of individuals in the tribal courts." The court further recognized that before enactment the Act was amended and provisions requiring restraints on blood requirements for membership were rejected as were first amendment, non-establishment clause provisions which would endanger the continued existence of Pueblo theocracies. App. to Pet. p. 37(a). The Appellate Court acknowledged that the deletion of the non-establishment clause in the 15th Amendment appears to have been in deference to the traditional Indian culture.

If sovereign immunity is to be taken from the tribes it must be taken by the legislative and not the judicial branch of government. Indeed, the case relied on by the Tenth Circuit Court of Appeals, *Dry Creek Lodge, Inc.* v. *United States*, 515 F.2d 926 (10th Cir. 1975), is clearly distinguishable. *Dry Creek* involved Indian land and the United States as a defendant and thus would have been properly brought in the federal court pursuant to 28 U.S.C. § 1331(a). *Moses* v. *Kennear*, 490 F.2d 21 (9th Cir. 1973). *Dry Creek* is of no assistance in teaching how the Act expressly waives the sovereign immunity of the tribe. The sovereign immunity of Indian tribes from suit in federal court cannot and has not been destroyed by implication. Titles 28 U.S.C. §§ 1331 and §§ 1343(4) are wholly insufficient to sustain jurisdiction against Indian tribes under the Indian Civil Rights Act.

All of the lower court opinions to date have glossed over Tribal sovereignty summarily and have held that

Congress has silently and by implication overruled an entire line of cases beginning with *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The Equal Protection Clause Of The Indian Civil Rights Act Does Not Incorporate The Standards Of The Equal Protection Clause Of The 14th Amendment And The 14th Amendment Standards Are Not Applicable To Tribal Membership Questions.

Assuming arguendo that federal courts have jurisdiction over matters involving tribal membership, then we must ask what legal standard is to be applied and what meaning is to be given to the equal protection language in the Indian Civil Rights Act. The following language expresses petitioners' feelings as to the proper approach to this question.

> "So long as the courts continue to operate on the belief that they have jurisdiction to review all facets of Indian tribal government under the Indian Civil Rights Act, it will be necessary for federal judges to develop an understanding of the unique factors which characterize the life of Indian political communities. In the observation of this writer, the most important issues in the mind of Indian people today are tribal autonomy and Indian separatism. The two are intertwined. Often the issue is phrased in terms of "tribal sovereignty:" . . . Courts should be cognizant of: . . . (7) The Tribes' inherent right to determine their own membership must be understood as vital to the survival of these people, and the broadest recognition must be given the tribes' determination. . . . Above all, courts must avoid the unconscious tendency to bring missionary zeal to the task of extending the blessings of our philosophy of individual liberties to Indian tribes and tribal members. *Ziontz, In Defense of Tribal Sovereignty*—20, South Dakota, L.R. 1, 47-48 (1975).

Beginning with *Worcestor* v. *Georgia*, supra, federal courts have adopted a federal judicial doctrine exempting tribal governments from any constitutional restraint in the exercise of power over tribal members. Indian tribes have been recognized as "dependent sovereign nations" with certain attributes of sovereignty which include the power of regulating their internal and social relations. Neither the "Bill of Rights" nor the Fourteenth Amendment are applicable to Indian tribes. *Talton* v. *Mayes*, 163 U.S. 376 (1896); *Native American Church* v. *Navajo Tribal Council*, supra.

In analyzing the Civil Rights Act courts have uniformly held that the equal protection clause of the Act is not subject to the same standard as the Constitutional guarantee of equal protection. *Groundhog* v. *Keeler*, supra; *Lohnes* v. *Cloud*, 366 F.Supp. 619 (D.N.D. 1973); *Yellow Bird* v. *Oglala Sioux Tribe of South Dakota*, 380 F.Supp. 438 (D.S.D. 1974).

The Court of Appeals in this case recognized that in an evaluation such as the present one, "the cultural autonomy and integrity of the tribes were entitled to be weighed. . . . At the same time nothing resembling a formula for determining which of these conflicting interests is to prevail has been furnished." App. to Pet. p. 39(a). The court went on to state that the scope, extent and importance of the tribal interest is to be taken into account and that the individual right to fair treatment under the law was likewise to be weighed against the tribal interest.

The Court of Appeals apparently recognized the fact that Congress did not intend to subject a tribe to those requirements which are exacted under the equal protection clauses of the Fourteenth and Fifteenth

Amendments to the Constitution of the United States. The court while stating that "The Fourteenth Amendment standards do not, however, apply with full force" Id. page 42(a), did not enunciate clear principles or guidelines stating what test is to be applied in cases of this type.

Judge Doyle went on to say "But we must still ask: Is the Tribe justified in deviating from the Fourteenth Amendment standard on the basis that tribal, cultural and ethnic survival would suffer from full-scale enforcement of subsection (8) to these facts? We must hold that the facts do not support the decision that the tribe's interest is *compelling.*" (Emphasis added.) The court after stating that the 14th Amendment standards do not apply, proceeds to apply strict compelling interest standards. The court then discusses the matter under the strictest of 14th Amendments standards and not something with less than "full force".

The court discounted the tribes cultural interests and indicated that the ordinance was the product of "economics and pragmatics". Id. p. 44(a). Indeed the court gave little or no consideration to the historical problems encountered by the Pueblo in dealing with the outside world that gave rise to the tribal membership law which was codified in the 1939 Ordinance. *Equal Protection Under the Indian Civil Rights Act: Martinez* v. *Santa Clara Pueblo,* 90 Harv. L. Rev. 627 (1977). The court ignored the record and the testimony as to the social makeup of the tribe as being patrilineal, patrilocal and patricultural by referring to the Lower Court's findings as "conclusory characterizations". Apparently the court did not consider the testimony of the only expert witness, Dr. Florence Hawley Ellis,

R.pp. 227-333, see also *The Pueblo Social Organization as Basis for Rules of Tribal Membership,* App. (k) p. 22(a)-62(a) Brief of Amici Curiae, the Pueblo De Cochiti, et al.

In *Daly* v. *United States,* 483 F.2d 700 (8th Cir. 1973), the court considered an ordinance requiring that half the members of a tribal council be of at least one half blood. This distinction is clearly more invidious than the alleged discrimination in this case as racial classifications are suspect and subject to strict scrutiny, *Loving* v. *Virginia,* 388 U.S. 1 (1967). The court in *Daly,* went on to uphold the blood quantum requirement which required one-quarter blood or more, for enrollment as a tribal member, but one-half blood or more for eligibility to be Chairman of the Council. This had been challenged as a denial of Equal Protection. The court stated:

> In the instant case, we also are convinced that the Tribe has sufficient cultural interest in setting a higher blood quantum requirement to hold office than for mere membership in the Tribe if it so desires. However, once the requirements are established, they must be applied uniformly to avoid violating 25 U.S.C. § 1302(8), pp. 705 & 706.

It appears that the uncertainty as to the proper standard to be applied under the equal protection provision of the Indian Civil Rights Act has been of concern to all the circuits. It is equally apparent that the circuits that have considered the problem are in general agreement that the necessity of preserving tribal culture and self-government requires the application of a different test than that applied under the Fourteenth Amendment. The 8th Circuit asked whether the allegedly discriminatory action was "founded in tribal

custom or governmental purpose which would justify modification of traditional equal protection concepts "*Means* v. *Wilson,* 522 F.2d 833 (8th Cir. 1975). The Ninth Circuit in *Howlett* v. *The Salish and Kootenai Tribes,* 529 F.2d 233, 238 (9th Cir. 1976) asked whether "strict application of traditional equal protection doctrines would significantly impair a tribal practice or alter a custom fairly imbedded in Indian culture."

While the courts have been unable to agree as to the proper standard, it is clear that the standard should be considerably less stringent than standard Fourteenth Amendment standards. However, Judge Doyle held the Pueblo to a higher standard than that applied by this Court to cases involving discrimination based on gender.

This Court has articulated several possible tests. The first of these, and the one that would apply under normal Fourteenth Amendment standards, is the "rational relation test". Where this standard applies it is required merely that there exist a rational relation between the classification and a legitimate state end. If, however, the Court finds a classification to be "suspect" then the state is required to demonstrate a "compelling interest". Classifications based upon race, alienage or national ancestry have been declared "suspect" classifications.

COMMENT. WAITING FOR MR. JUSTICE POWELL. THE SUPREME COURT AND SEX BASED DISCRIMINATION, 5 Capital U. L. R. 227 (1976).

The Court in *Reed* v. *Reed,* 404 U.S. 71 (1971) struck down a statute that preferred men over women for appointment as administrators of estates. It applied the rational relation test, and found no rational

relation between the statute and its intended purpose. The Court again applied the rational relation test in *Kahn* v. *Shevin,* 416 U.S. 351 (1974) holding that a statute granting widows but not widowers a tax exemption was reasonable. In *Geduldig* v. *Aiello,* 417 U.S. 484 (1974) the Court again applied the rational relation test and found that the California Public Disability Fund did not violate the Equal Protection clause by withholding weekly benefits from women who had continuous disabilities as a result of normal pregnancy. For other cases applying rational relation test, see also, *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); *Taylor* v. *Louisiana,* 419 U.S. 522 (1975); *Stanton* v. *Stanton,* 421 U.S. 7 (1975); *General Electric Company* v. *Gilbert,* 429 U.S. 125 (1976). In *Craig* v. *Boren,* 429 U.S. 190 (1976) the Court stated that "Classification by gender must serve important governmental objectives, and must be substantially related to achievement of those objectives." The Court proceeded to strike down a statute that prohibited sale of 3.2 beer to males under twenty-one years of age but allowed sale to females over eighteen years of age.

It is respectfully submitted that the legal standard to be applied in Indian Civil Rights Act cases, if any, should be a "rational relation" test. The question then is whether there is any rational relation between the 1939 Santa Clara Ordinance and the cultural and traditional values of the tribe. If so, the Ordinance is a valid classification, and must be allowed to stand. The standard of equality must not be that of the Anglo Saxon society but a tribal standard of equality, and as the district court held, applied with an even hand.

Does the Santa Clara Ordinance of 1939 meet the requirements of this test? We submit that it does.

Assuming arguendo that the Act is applicable to membership questions, the pertinent facts are such that even if the courts substitute their political judgment for that of the tribe the Ordinance must stand as being culturally based and necessary to the preservation of the tribe.

It is undisputed that the Santa Clara enrollment rule was applied uniformly to all and that there has been no exception to the rule since it was codified in 1939. So long as there are no exceptions and identical rules and laws are applied to all members with either and even hand, or in a fair manner, then such action is within the safeguard intended and proper.

Petitioners strongly feel the enrollment rule of the Santa Clara Pueblo clearly meets the stricter requirements of the "rational relation" standard as the test has been construed in recent cases. The Governor of Santa Clara Pueblo, when asked the probable effect of not enforcing the 1939 Ordinance testified that:

> "It would tend to destroy the Pueblo as a whole. . . . Without it we would have an influx of people that we don't know who they are. They would come in from all directions; Indians and non-Indians alike. So it would be a destruction on the Santa Clara Indian culture. R.p. 117."

In response to a similar question, Dr. Florence Hawley Ellis, a retired Professor of Anthropology and a leading expert on New Mexico Pueblo Indians (R.pp. 227-336) testified as follows:

> "Well, because of the importance of men in connection with the carrying on of the culture, the training of the children in the socio-religious situation, *the culture eventually would break down and be lost.*" R.p. 251 (emphasis added).

It is noteworthy that the only testimony on this issue was that of the quoted witnesses, notwithstanding the fact that the Respondents had listed in the pre-trial order as an expert witness, Dr. Alfonso Ortiz, an anthropologist, Tewa Indian from San Juan Pueblo. One can only assume that he was in agreement with the testimony of the Governor of Santa Clara Pueblo and Dr. Florence Hawley Ellis and was not called as a witness for that reason.

It is without question therefore that under the rational relation test and even under the compelling interest test, the Pueblo must prevail. In both the opinion of the only expert witness and that of the Governor of the Pueblo, altering the present rule would be tantamount to destroying the very tribe the Martinez' would be members of. This surely was not intended by Congress. The Martinez have made it clear they do not desire this result. App. to Pet. p. 25(a). If survival of the Pueblo is not a "compelling" interest then the word is without meaning.

The recent Supreme Court decision in *Morton* v. *Mancari,* 417 U.S. 535 (1974), sheds additional light on the special and unique legal status of Indian tribes. The lower court in *Mancari,* a three-judge district court, ruled that the "Indian Preference Act" was repealed, and included dicta indicating the Act was unconstitutional. The Supreme Court in reversing made the following observations:

> Resolution of the instant issue turns on *the unique legal status of Indian Tribes under federal law* and upon the plenary power of Congress, based

> on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes . . . Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for *special treatment* a constituency of tribal Indians living on or near reservations. p. 551 (emphasis added).
>
> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process. p. 555.

Mancari acknowledges the special legal status of Indians and Indian Tribes. Had the case involved non-Indians it seems fairly clear that the Act would have been held unconstitutional, however, the preference was "reasonable and rationally designed to further Indian self-government . . ." and thus sustained.

The Fiallo Test:

The Governmental function of an Indian tribe in adopting members is analogous to the naturalization of citizens by the United States. Indeed, the Supreme Court has referred to tribal enrollment as "Indian naturalization." *Cherokee Intermarriage Cases,* 203 U.S. 78 (1906). That description is particularly apt because the absolute discretion of an Indian tribe to determine the requirements for enrollment in the tribe is as broad as that of the United States to determine the requirements for citizenship. An alien has no inherent right to naturalization and Congress may refuse or may grant naturalization upon any conditions it

may prescribe. "No alien has the slightest right to naturalization unless all statutory requirements are complied with. . . ." *United States* v. *Ginsberg,* 243 U.S. 472 (1917).

In view of the fact that this case involves tribal membership, which is analogous to citizenship in the United States, it should be decided in accordance with *Fiallo* v. *Bell,* —— U.S. ——, No. 75-6297 decided April 26, 1977. *Fiallo* involves immigration laws that provide special status to aliens who qualify as the "children" or "parents" of United States citizens or lawful permanent residents. The Act grants special preference to an illegitimate child seeking preference by virtue of its relationship with its natural mother, but no special preference by virtue of a child's relationship with its natural father. As a result, the natural father of an illegitimate child which is either a United States citizen or permanent resident alien is not entitled to preferential treatment as a "parent". An illegitimate child seeking preference by virtue of his relationship with his natural father who is a citizen or lawful permanent resident is likewise denied preferential treatment as a "child".

The Court upheld the ruling of a three-judge district court noting at the outset "the limited scope of judicial inquiry into immigration legislation". Notwithstanding the argument that the case involved "double-barreled" discrimination based on sex and illegitimacy, the Court concluded that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision."

Petitioners strongly urge that the proper test to be applied to Indian Civil Rights Act cases that involve

tribal membership is the test applied in *Fiallo*, "that these are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress (tribe) . . ." Application of this test would keep intact the law concerning tribal membership as it existed prior to passage of the Act. Criteria for membership in a tribe is a policy decision that should be made exclusively by the tribe, and federal courts should not substitute their judgment for that of the tribe's.

The Court of Appeals found that the enrollment rule is strictly the result of economics. This finding is inconsistent with the facts and the findings of the district court and simply answered by showing that the group of people in the class represented by Audrey Martinez has never been asked to leave the Pueblo, notwithstanding the fact that there are over one hundred people in that category, more than ten percent of the entire population. App. to Pet. p. 14(a). Also of relevance is the fact that illegitimate children born to a Santa Clara woman are granted full rights and cared for by the Pueblo. R.p. 145.

The trial court was imminently correct in its holding that:

> the equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and therefore should be preserved and which of them are inimical to cultural survival and should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because

> they must live with the decision every day. Obviously they can and should be the judges of whether a particular rule is beneficial or inimical to their survival as a distinct cultural group. App. to Pet. p. 26(a).

It is extremely unfortunate that the Martinez family had difficulty enrolling their children for purposes of obtaining Federal benefits; and especially saddening is the fact that one of the children allegedly died because of lack of medical attention. However, this is in no way attributable to lack of membership in Santa Clara Pueblo, not the fault of Santa Clara Pueblo's officials and certainly not pertinent to the ultimate decision of this case.

The decision in this case has a far reaching affect not only on Santa Clara Pueblo, but on all sovereign Indian tribes in the United States. This decision may very well be the difference between survival or destruction of American Indian tribes as they now exist. See *Implication of Civil Remedies Under the Indian Civil Rights Act, Michigan Law Review,* Nov. 1976. As indicated by the United States at least thirteen other Indian tribes have membership provisions based upon the father's or mother's blood line. *Memo submitted in response to the Court's Order of January 1977,* P. 9, Note 9.

The trial court after hearing evidence, observing the witnesses and being close to the facts and people involved concluded that:

> Much has been written about tribal sovereignty. If those words have any meaning at all, they must mean that a tribe can make and enforce its decisions without regard to whether an external

> authority considers those decisions wise. To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it. Congress has not indicated that they intended the Indian Civil Rights Act to be interpreted in such a manner. App. to Pet. p. 26(a).

The people of Santa Clara Pueblo have withstood the ravages of small-pox and other epidemics, and the fact that they have been surrounded by an alien culture, first Spanish and later American since, 1688. Can they survive the very Act that was intended to help guard their civil rights, or will it destroy these people under the guise of saving them?

CONCLUSION

In conclusion, it is Petitioners' position that the Tenth Circuit Court of Appeals should be reversed and the case dismissed for the following reasons:

1. Santa Clara Pueblo is immune from suits of this nature and the federal courts do not have jurisdiction.

2. If this Court should find that the lower court did have jurisdiction then the Court of Appeals should be reversed because the review of tribal membership problems should follow the law in *Fiallo* v. *Bell,* supra, and not substitute the court's judgment on this issue for that of the tribe.

3. If the Court decides that the Santa Clara Ordinance of 1939 should be tested by Fourteenth Amendment standards, then the proper legal standard is the "rational relation" standard since there is a rational relation between the Ordinance and survival of the

Santa Clara Pueblo, the Ordinance can withstand the challenge.

4. Finally, the problems of survival for Santa Clara Pueblo are such that the 1939 Ordinance meets even the strict scrutiny of the "compelling interest" test even though we submit that clearly is not the applicable test.

Respectfully submitted,

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Supreme Court, U. S.
FILED
AUG 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-682

SANTA CLARA PUEBLO, et al.,
Petitioners,

v.

JULIA MARTINEZ, et al.,
Respondents.

RESPONDENTS' BRIEF

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BRADFORD PRINTING COMPANY, DENVER

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Dodge v. Nakai, 298 F.Supp. 17 (D.Ariz. 1969) 10

Dorr v. United States, 195 U.S. 138 (1904) 26

Downes v. Bidwell, 182 U.S. 244 (1901) 26

Dred Scott v. Sandford, 60 U.S. 393 (1857) 45

Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975) 10, 11, 21

Edelman v. Jordan, 415 U.S. 651 (1974) 19

Edwards v. California, 314 U.S. 160 (1941) 44

Fiallo v. Bell, — U.S. —, 52 L.Ed.2d 50 (1977) 44

Fisher v. District Court, 424 U.S. 382 (1976) 27

Frontiero v. Richardson, 411 U.S. 677 (1973) 29

Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971) 24

Hernandez v. Texas, 347 U.S. 475 (1954) 30

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956) 16

Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973) 10, 11

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Laramie v. Nicholson, 487 F.2d 315 (9th Cir. 1973), *cert denied*, 419 U.S. 871 11

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 19

Luxon v. Rosebud Sioux Tribe, 455 F.2d 698 (8th Cir. 1972) 10

Marsh v. Alabama, 326 U.S. 501 (1946) 26

Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 ... 15, 40

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Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) 16

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Reed v. Reed, 404 U.S. 71 (1971) 29, 39

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Samuel v. University of Pittsburgh, 375 F. Supp. 1119 (W.D.Pa. 1974), *appeal dismissed*, 506 F.2d 355 (3rd Cir. 1974)	33, 39
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Territory of Hawaii v. Mankichi, 190 U.S. 197 (1903)	26
Thompon v. Tonasket, 487 F.2d 316 (9th Cir. 1973), *cert. denied*, 419 U.S. 871	11
Toledo v. Pueblo de Jemez, 119 F.Supp. 429 (D.N.M. 1954)	16
United States v. Antelope, — U.S. —, 51 L.Ed.2d 701 (1977)	27
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United States v. King, 395 U.S. 1 (1969)	19
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Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)	29
White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973)	24
Wisconsin v. Constantineau, 400 U.S. 433 (1971)	20
Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975)	24
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Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	19
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U.S. Const. art. I, § 9, cl. 3	11
U.S. Const. amend. 1	11
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28 U.S.C. § 1343(4) 10, 17
28 U.S.C. §§ 2241-55 18
28 U.S.C. § 2283 18
42 U.S.C. § 1982 17
Pub.L. 94-574, 90 Stat. 2721 (1976) 20

Treatises and Articles

D. Burnett, An Historical Analysis of the 1968 Indian Civil Rights Act, 9 Harv.J.Leg. 557 (1972) .. 23,24

F. Cohen, Handbook of Federal Indian Law, p. 98 (U.N.Mex. Reprint of 1942 Ed., 1971) 43

3 K. Davis, Administrative Law Treatise § 27.03, p. 553 (West 1958) 20

E. Dozier, Factionalism at Santa Clara Pueblo, 5 Ethnology #2, p. 172 April, 1966 ..... 32, 37, 41, 46, 47, 48

E. Dozier, The Pueblo Indians of North America (Holt, Rinehart & Winston 1970) ... 40, 42, 46, 47

A. Ortiz, The Tewa World (U.Chicago Pr. 1969) 40, 48

Treatises and Articles (Continued) Page

E. Parsons, The Social Organization of the Tewa of New Mexico (Amer. Anthro. Ass'n 1929) p. 38 .. 36

C. Wright, Law of Federal Courts, p. 186 (2d Ed. 1970) 20, 21

Note, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv.L. Rev. 1343 (1969) 10, 27, 34, 40

Other

H.Rep. 94-1656, 94th Cong., 2d Sess. (1976) 20

S.Rep. 721, 90th Cong., 1st Sess. (1967) 12

S.Rep. 841, 90th Cong., 1st Sess. (1967) 12, 13, 15, 19, 23

Hearings on Constitutional Rights of American Indians Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. (1961) 11

Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. (1962) 11, 41

Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess (1963) 11

Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 88th Cong., 2d Sess., Summary Report of Hearings and Investigations on Constitutional Rights of the American Indian (Comm. Print 1964) 12, 14

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Hearings on S.961 etc., Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. (1965) .. 11, 14

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Hearings on H.R. 15419, etc., Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968) 13, 14, 16

113 Cong.Rec. 13473-75 (1967) 16, 23

113 Cong.Rec. 35473-74 (1967) 12, 23

76 I.D. 353 (1969) 31, 40

25 C.F.R. §§ 80.1(e), 80.3 3

25 C.F.R. §§ 91.1(c), 91.3 3

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IN THE

Supreme Court of the United States

October Term, 1977

No. 76-682

SANTA CLARA PUEBLO, et al.,
Petitioners,

v.

JULIA MARTINEZ, et al.,
Respondents.

RESPONDENTS' BRIEF

QUESTIONS PRESENTED

1. Do the federal district courts have jurisdiction to grant equitable relief against Indian tribes for violations of the Indian Civil Rights Act?

2. Does a tribal rule barring from membership the children of mixed marriages of female members, but mandating membership for the children of mixed marriages of male members, violate 25 U.S.C. §1302(8), which prohibits an Indian tribal government from denying equal protection of its laws or due process of law?

STATEMENT OF THE CASE

Pursuant to Rule 40.3, respondents' statement is limited to those points necessary to correct inaccuracies and omissions in petitions' brief.[1]

[1]Hereinafter all references to "respondents" will be stated "plaintiffs" and all references to "petitioners" stated "defendants," except references to Petitioners' Brief.

Plaintiff Julia Martinez is a full-blooded Santa Clara Indian, a member and lifelong resident of the Pueblo. Her husband, Myles Martinez, is a full-blooded Navajo Indian and has resided at the Santa Clara Pueblo since his 1941 marriage to Julia, except for his military service in World War II. Their children, plaintiff Audrey Martinez and her brothers and sisters, are thus of full Indian ancestry and half Santa Clara ancestry. They are lifelong Pueblo residents except for time away at school. All the Martinez children speak and understand Tewa, the traditional and official language of the Pueblo; observe traditional customs; and are accepted into the ancient religion of the Pueblo.

These facts led the district court to find that the Martinez children "are culturally, for all practical purposes, Santa Clara Indians." 402 F.Supp. at 18, Pet. 26a. The Court of Appeals concluded that they "are, culturally, members of the Pueblo." 540 F.2d at 1041, Pet. 31a.

Contrary to defendents' claim that Santa Clara Pueblo is a traditional theocracy, the district court found that ". . . the present Pueblo government is neither wholly traditional nor wholly anglicized." 402 F.Supp. at 13, Pet. 15a. The constitution of the Pueblo was adopted in 1935 pursuant to the Indian Reorganization Act, 25 U.S.C. §476. Power to determine membership questions is granted by the Pueblo Constitution to the Tribal Council. A. 1-7.

Membership determinations by the Council affect a wide range of rights, both tribal and federal. Only Pueblo members have tribal political rights, enjoy material benefits such as land use rights, and have the right to remain living at the Pueblo. 402 F.Supp. at 14, Pet. 17a-18a. Many federal benefits are expressly contingent upon membership in an Indian tribe, for example, preference in certain federal employment (*Morton v. Mancari*, 417 U.S. 535 (1974), 25 C.F.R. §§277.3(h), 277.28, 275.2(g)); participation

in the Indian Business Development Program (25 C.F.R. §§80.1(e), 80.3), the Indian Revolving Loan Fund (25 C.F.R. §§91.1(c), 91.3(a)), the Loan Guaranty, Insurance and Interest Subsidy Program (25 C.F.R. §§93.1(c), 93.8); and special federal educational benefits (25 C.F.R. §§273.2(j), 273.12).

Denial of membership has caused hardship to the Martinez family, especially in obtaining federal medical care available to Indians. In 1968 Julia Martinez's now-deceased daughter Natalie, sufflering from strokes associated with her terminal illness, was refused emergency medical treatment by the Indian Health Service. This was solely because her mother had previously been unable to obtain tribal recognition for her. Only after meeting with Interior Department solicitors did Mrs. Martinez obtain Bureau of Indian Affairs census numbers for her children. Tr. 15-17, 46-48, 50-51.[ii] At the time of trial the Martinez children were encountering no difficulties in receiving medical care, as defendants have noted. Since then, however, Martinez grandchildren have had problems in obtaining medical care from the Indian Health Service.

Those of the Martinez children who are grown are unable to obtain Pueblo land assignments upon which to make homes of their own. To stay on the Pueblo, they must reside with their mother or other member relative.

Defendants claimed at trial that the 1939 Pueblo Ordinance is essential to the religious heritage of the Pueblo, but the district court found that it is unrelated to the Pueblo religion. 402 F.Supp. at 16, Pet. 21a.

The traditional Santa Clara society frowned on mixed marriages by either sex (Tr. 165, 188), and prior to the 1930's mixed marriages at the Pueblo were rare. Tr. 165,

[ii]Because there is no consecutive pagination of the Record as a whole, citations to the reporter's transcript are cited herein as "Tr."

188; R. vol. II Pl. Ex. 1 p. 29 (Tr. 255).[iii] The few cases of children of such marriages were handled case-by-case based on cultural and religious affinity to the Pueblo. 402 F.Supp. at 16, Pet. 21. This traditional rule is codified in the Pueblo Constitution of 1935, which mentions no discrimination. A.2. The principal purpose of the 1939 Ordinance was to reduce claimants to Pueblo land and money. 540 F.2d at 1047, Pet. 44a; 402 F.Supp. at 15, Pet. 20a. As late as 1942, the Pueblo contemplated exceptions to the Ordiance upon payment of a fee. R. vol. II Pl.Ex. 15 (Tr 335). Based on these facts, the district court stated that the Ordinance represented a "break with tradition." 402 F.Supp. at 16, Pet. 21a. The Ordinance, which mandates the membership of male-line children without regard to cultural or religious affinity, is thus not a traditional rule as defendants claim.

SUMMARY OF ARGUMENT

The district court had jurisdiction to award plaintiffs equitable relief, and tribal sovereign immunity does not defeat jurisidiction. All four circuit courts of appeals that have reviewed actions arising under the ICRA have so ruled. The legislative history demonstrates that the purpose of the ICRA is to guarantee to persons under tribal jurisdiction the same constitutional rights enjoyed by other Americans.

Remedies under the ICRA cannot be limited to habeas corpus. Many of the rights enumerated in the Act would never arise in the context of tribal custody and would thus be unenforceable. The rights conferred on individual Indians would thus be greatly inferior to the rights enjoyed

[iii] Plaintiffs' exhibits 1-3 were offered and admitted at points noted in the transcript. All other plaintiffs' exhibits were offered at Tr. 335, but the district court elected to hold a separate proceeding in chambers after the trial at which the other exhibits were admitted. The record does not include a transcript of this proceeding.

by others, contrary to Congress' intent. The legislative history demonstrates specific congressional concern with the denial of an equitable remedy by the federal courts in cases involving tribal membership, free exercise of religion, and tribal taxing power. By contrast there is no support in the history for an intent to confine remedies to habeas corpus. Relevant decisions of this Court sustain the jurisdiction of the district courts over analogous cases denying basic rights. For many years the remedy of habeas corpus has been broadly governed by statute, while the equitable powers of the federal courts have not except for specific limitations. Congress followed this tradition in the ICRA.

Tribal sovereign immunity as a bar would defeat the same general and specific purposes manifested on the face of the ICRA and in its legislative history as were discussed in prior sections. Congress recognized that tribal sovereign immunity was one of the basic problems giving rise to the need for the ICRA. The Senators knew very well that enactment of the ICRA would be a federal limitation on tribal sovereignty.

In considering sovereign immunity, one must distinguish between actions such as this one, seeking equitable relief against the future conduct of a government violating basic constitutional rights, from others, particularly actions seeking damages for past wrongs. *Ex parte Young*. Defendants ignore this distinction, but many of the evils they claim would follow from ICRA jurisdiction would be consequences of money judgments. The remedy represented by *Ex parte Young* has long been a basic rule of constitutional law. In light of this and the intent of Congress in enacting the ICRA, Congress cannot have intended to exclude traditional equitable relief.

The standards of 25 U.S.C. §1302(8) are the same as their constitutional counterparts, a conclusion supported by the legislative history of the ICRA. The Senate Sumcom-

mittee deliberately rejected a weaker standard of equal protection. Also, defendants' suggested weaker standard of "even-handed application" is at odds with equal protection precedent and with other terms of the ICRA, and it would lead to absurd results. The legislative history also suggests that Congress may have intended by the Act to resolve the possibility of direct application of the Constitution to the tribes, again supporting use of constitutional standards.

Application of equal protection and due process standards to an Indian tribal context will and should differ from federal and state contexts. This view is supported by decisions of this Court sustaining laws applying only to Indians against fifth and fourteenth amendment challenges, where the classification was held justified by the historical and legal status of the tribes. The equal protection clause requires that a governmental classification significantly further a legitimate governmental purpose. This requires a determination that the government's means be substantially related to its ends, and a judgment about the relative importance of the individual and governmental interests at issue. The former inquiry does not interfere with any justifiable interests based on tribal culture. On the other hand judgments about the relative importance of the interests will in some cases involve distinct social or cultural standards. Tribes should have the opportunity to show that a particular individual right should be viewed as less important in the tribal context, and individuals should have a chance to show the opposite. Tribes should also be able to show that denial of very important rights is justified as incompatible with their separate political status. Racial affinity to a tribe is a justifiable tribal classification, while tribal rules favoring whites over blacks would not be.

Due process analysis is similar. Conclusive and irrebuttable presumptions which burden important personal

liberties deny due process. Such presumptions deny individuals the basic opportunity to be heard on important questions of liberty and property. Again, justifications unique to the tribal context may be shown.

The 1939 Ordinance penalizes Julia Martinez in her choice of a spouse in a way that her male counterpart is not, and she is prevented from passing her house and land use rights to her children. The Martinez children suffer ancestry discrimination — male line versus female line. At present this denies them all political rights and the chance to obtain a land use permit to make a permanent home. They can stay on the Pueblo only by residing with their mother or other member relatives. In the future they face the prospect of being forced to leave their cultural homeland. The unique interest of persons raised in a lawfully separate culture and society should be deemed fundamental in an Indian tribal context. The very cultural and religious values espoused by defendants support this contention. Defendants claim that the Ordinance is based on fathers passing on the culture. If so this is a conclusive presumption which the Martinez children are not permitted to rebut. The Ordinance denies plaintiffs extremely important personal rights and liberties, and defendants bear a heavy burden of justification.

Defendants at trial attempted to justify the 1939 Ordinance as necessary to preserve Santa Clara religion and culture. The trial court found the Ordinance to be unrelated to the religion, and the evidence strongly supports this finding. The trial court's views on cultural evidence were equivocal, but more importantly it ruled that it would not judge the cultural issue. However, it is defendants who claim a cultural justification; plaintiffs sought only to refute the claim. The district court's nontraversable plea of cultural nexus would immunize every tribal action from the ICRA.

In practice the 1939 Ordinance not only excludes the Martinez children, it mandates the membership of their male-line counterparts without regard to religious or cultural affinity to the Pueblo. The record shows that male-line children of half or less Indian ancestry, raised away from the Pueblo and knowing nothing of its language, culture, religion, or traditions, are made members by the Ordinance.

Defendants purported to be concerned about cultural outsiders, but the effect of the Ordinance is not to exclude them. The Martinez children are persons within the cultural group who have been allowed to develop a substantial stake in the life of the tribe. The actual purpose of the Ordinance was to hold down tribal membership to enlarge the shares of money and land for members, which purpose could have been accomplished without resort to discrimination. Racial affinity to the tribe and thus mixed marriages are legitimate tribal interests, but the Ordinance is a wholly arbitrary and irrational response thereto. This dispute is not over the legitimacy of the Pueblo's claimed purposes to maintain Santa Clara religion and culture; it is over the means chosen to promote those ends, which not only fail to serve them but are counter-productive.

The district court's finding that the Ordinance is rooted in certain traditional values is a wholly inadequate justification. Tradition alone cannot justify violation of the ICRA. The district court's findings that the Pueblo was traditionally patrilineal and patrilocal are shown by the evidence to be the same kinds of male dominance common to American society and to most societies. The tie between these traditions and the Ordinance is extremely tenuous at best. The Ordinance was a break with tradition, whose main purpose was to limit claims to Pueblo money and land, in response to the recent phenomenon of per capita payments.

The district court's view amounts to the rule that the Pueblo has a compelling interest in any membership rule, no matter how arbitrary or trivial. In fact, the interest differs greatly according to the situation, particiularly as between cultural insiders and outsiders. The legislative history of the ICRA discloses specific concern with tribal membership and the intent to eliminate a very significant Pueblo membership tradition, that of enforced religious conformity. The entire scheme of formal, lifelong enrollment is an Anglo concept imposed on the tribes by the Bureau of Indian Affairs to control distributions of money, land and other benefits. As cultural Santa Clarans, the Martinez children would be members in the traditional oral society — only under BIA concepts are they excluded.

Defendants' argument that the immigration cases support the Pueblo is misplaced. The immigration power is a unique sovereign prerogative committed by the Constitution to Congress. Furthermore, the Pueblo here seeks to justify an action whose federal analogy is prohibited even to Congress. The Constitution forbids Congress to expel or deny rights to native-born insiders, yet that is just what the Pueblo seeks to do.

The district court's finding that the Santa Clara Pueblo was traditionally patrilineal in kinship (as opposed to surnames) is contrary to all the evidence in the record and in the literature and is therefore clearly erroneous. The finding that the Pueblo was traditionally patrilocal is contradicted by the most reliable sources on Santa Clara and is based on faulty inferences from the record; it is also clearly erroneous.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION

Plaitiffs contend that the district court had jurisdiction to award them equitable relief and that tribal sovereign immuntiy does not defeat jurisdiction. This conclusion is sup-

ported by the purpose, language, and legislative history of the Indian Civil Rights Act[1], by ICRA precedents in the lower courts, and by analogous precedents in this Court.

A. *ICRA Precedents.*

The first federal district court to construe the ICRA sustained jurisdiction to enforce the Act by equitable relief pursuant to the ICRA and 28 U.S.C. §§ 1331 and 1343(4). *Dodge v. Nakai*, 298 F.Supp. 17, 25 (D.Ariz. 1969) (Craig, C.J.). The first detailed law review analysis of the ICRA reached the same conclusion.[2] Subsequently, four circuit courts of appeals have reviewed the question, and all have sustained jurisdiction to grant equitable relief pursuant to the ICRA and 28 U.S.C. § 1343(4). *Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698, 700 (8th Cir. 1972); *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200, 203 (9th Cir. 1973); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1234 (4th Cir. 1974); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 933 (10th Cir. 1975). *See also, Seneca Constitutional Rights Org. v. George*, 348 F.Supp. 48, 50 (W.D.N.Y. 1972).

The courts have developed a rule that internal remedies within the tribal government must usually be exhausted as a condition to federal court jurisdiction. *E.g., O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973). However, the district court here ruled that plaintiffs had exhausted all tribal remedies within the Santa Clara Pueblo, and this ruling is not challenged in this Court. 402 F.Supp. at 10-11, Pet. 10a-11a.

The same four circuit courts rejected the argument that tribal sovereign immunity defeats federal court jurisdiction and ruled that the ICRA was intended to limit tribal im-

[1]The statute under review, 25 U.S.C. §§ 1301-03, has been referred to as the Indian Civil Rights Act (herein ICRA) and the Indian Bill of Rights, and both terms are used interchangeably in this brief.

[2]Note, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv. L. Rev. 1343, 1371-73 (1969).

munity in cases where the Act applies. *Daly v. United States*, 483 F.2d 700, 705 (8th Cir. 1973); *Means v. Wilson*, 522 F.2d 833, 841 (8th Cir. 1975); *Johnson v. Lower Elwha Tribal Community, supra*, 484 F.2d at 202; *Crowe v. Eastern Band of Cherokee Indians, Inc., supra; Dry Creek Lodge, Inc. v. United States, supra. See also, Seneca Constitutional Rights Org. v. George, supra.*

Finally, the one other circuit court of appeals to review jurisdiction over a tribal membership case sustained federal court jurisdiction, and this Court declined review. *Laramie v. Nicholson*, 487 F.2d 315 (9th Cir. 1973); *cert. denied*, 419 U.S. 871; *Thompson v. Tonasket*, 487 F.2d 316 (9th Cir. 1973), *cert. denied*, 419 U.S. 871.

B. *Background and Purpose of the ICRA.*

The manifest purpose on the face of the ICRA is to impose enumerated standards of the Constitution on self-governing Indian tribes. The standards are taken, mostly verbatim, from the Constitution, art. 1, § 9, cl. 3 and amendments 1, 4, 5, 6, 8, and 14. The Act expressly imposes these standards on all forms of governmental action by Indian tribes, whether they be legislative, executive, or judicial in character, and on "all offices, bodies, and tribunals by and through which they are executed." 25 U.S.C. § 1301(2).

The legislative history of the ICRA involves extensive hearings beginning in 1961, yielding four hearing reports between 1961-65[3] and summary reports on the hearings

[3]Hearings on Constitutional Rights of American Indians Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. (1961); Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. (1962); Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. (1963); Hearings on S.961, etc., Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. (1965).

by the Subcommittee Staff in 1964[4] and 1966.[5] Senator Senator Ervin and other Subcommittee members introduced bills into the 88th Congress (S.3047) and 89th Congress (S.961), each of which would have imposed on Indian tribes the same limitations that the Constitution imposes on the federal government. Neither bill ever got as far as a full committee report. In 1965 the Interior Department suggested substituting an enumerated list of rights for the direct application of the Constitution. The Subcommittee accepted the Interior bill with one important change involving equal protection, which is discussed below at pages 23-24. This bill was introduced into the 90th Congress as S.1843 and sent to Committee. The Senate Judiciary Committee voted out the bill and issued the only committee report on any of these bills, S.Rep. 841, 90th Cong., 1st Sess. (1967). The full Senate unanimously passed S.1843 on December 7, 1967. 113 Cong. Rec. 35473 (1967).

Impatient with slow progress in the House, Senator Ervin also persuaded the Senate to add the full text of S.1843 as a floor amendment to H.R. 2516, which dealt with other civil rights matters and had already passed the House. The Senate Judiciary Committee had refused this amendment so its report includes comments on it only by Senator Ervin in dissent. S.Rep. 721, 90th Cong., 1st Sess. (1967). The Senate passed H.R. 2516 with the Indian rights amendment on March 11, 1968.

The House began committee hearings on the separate Indian rights bill (S.1843) and a House version (H.R.

[4]Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 88th Cong., 2d Sess., Summary Report of Hearings and Investigations on Constitutional Rights of the American Indian (Comm. Print 1964).

[5]Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., Summary Report of Hearings and Investigations on Constitutional Rights of the American Indian (Comm. Print 1966).

15419) on March 29, 1968.[6] But on April 10, 1968, the full House passed H.R. 2516 with the Indian rights amendment.

As this summary shows, the only committee report on any of the bills leading to the ICRA is the Senate Judiciary Committee Report, S.Rep. 841, 90th Cong., 1st Sess. (1967). This report sets out the basic purpose of the Act (at page 6):

> PURPOSE OF THE LEGISLATION
>
> The purpose of S.1843, as amended, is to insure that the American Indian is afforded the broad constitutional rights secured to other Americans.
>
> TITLE I
>
> The purpose of Title I is to protect individual Indians from arbitrary and unjust actions of tribal governments. This is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government. These limitations are the same as those imposed on the Government of the United States by the U.S. Constitution and on the States by judicial interpretation.

Throughout this report and the Staff Reports mentioned above,[7] the reference is uniformly to constitutional rights being imposed, and there are frequent statements that the

[6]Hearings on H.R. 15419, etc., Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968).

[7]Notes 4 and 5 above.

limitations are the same as those imposed on the federal and state governments.[8]

Plaintiffs submit that the right to judicial review is a necessary part of constitutional limitations — so much so that the above statement of purpose refers naturally to limitations imposed by "judicial interpretation." Without meaningful judicial review, the ICRA rights would be so much inferior to the rights protected by the Constitution as to contradict the statement of purpose.

C. *Equitable Remedies.*

The Indian Bill of Rights expressly guarantees the federal remedy of habeas corpus from tribal custody. 25 U.S.C. § 1303. Defendants argue that this remedy must be held to be exclusive of all others. Plantiffs contend that this argument should be rejected, because the habeas remedy would not fulfill many of the manifest purposes of the Indian Bill of Rights; it would not fulfill specific purposes indicated by the legislative history; there is no indication that Congress intended habeas to be the sole remedy; this Court has generally sustained remedies in analogous civil rights cases; and habeas has long been a statutory remedy while equitable relief has not.

Many of the rights enumerated in the Indian Bill of Rights would rarely, if ever, arise in the context of tribal custody. Taking of property; taxation without due process; warrantless searches; bills of attainder; denial of equal rights to vote, or of freedom of the press, or of the right

[8]The Senate Subcommittee Staff expressly recommended legislation ". . . designed to insure that Indian citizens receive the inalienable rights guaranteed to all citizen of this country." They recommended that "[t]he constitutional rights and protections conferred upon American citizens should be made applicable to American Indians in their relationship with their tribal governing bodies." 1964 Subcommittee Staff Report of Hearings, *supra*, n.4, at page 23. *See also*, 1966 Subcommittee Staff Report of Hearings, *supra* n.5 at p. 5; Hearings on H. R. 15419, etc., *supra* n.6 at p. 17.

of peaceable assembly, or of the right to petition for redress of grievances, or of free speech — all frequently or exclusively occur absent custody. Even criminal procedural rights can be denied in proceedings ending in non-custody punishments such as a fine, restitution, loss of land use rights, or banishment from the reservation.[9] The ICRA would be an empty undertaking indeed if these rights were unenforceable.

As noted above, the general purpose of the Indian Bill of Rights was to give Indians under tribal jurisdiction the same constitutional rights that other Americans enjoy under the state and federal governments.[10] Since other Americans have access to equitable remedies for non-custody violations of rights, denial of equitable remedies against tribes would not be the same, it would be greatly inferior.

More specifically, the legislative history indicates the intent to alter the legal effect of prior federal court decisions denying a remedy to persons denied basic rights in non- custody circumstances. As previously stated, there is only one committee report on the bill which became the ICRA or any of its predecessors. This report discusses the "Denial of rights by tribal governments" principally by discussing seven reported federal court opinions which had denied a remedy to persons under tribal jurisdiction.[11] Five of these seven were civil cases, where a habeas remedy would not apply. One of these was *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960, a dispute over tribal membership dismissed by the federal

[9]Loss of land use rights and banishment are punishments which have been used by Indian tribes. *See* discussion below at pages 41-42.

[10]*See* discussion at pages 13-14.

[11]S.Rep. 841, 90th Cong., 1st Sess. (1967), pp. 9-10. The Report also discusses an eighth federal case, Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965), in which a federal court *granted* a remedy in a criminal case against Indian tribal custody.

courts for want of jurisdiction. Two others, *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959), and *Toledo v. Pueblo de Jemez*, 119 F.Supp. 429 (D.N.M. 1954), were claimed denials of the right of free exercise of religion, again dismissed by the federal courts for want of jurisdiction. The other two civil cases involved tribal power to tax. *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932, was a challenge by non-Indians to a tribal tax; it raised fifth and fourteenth amendment questions. *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), was a challenge by Indians to a tribal tax. The case also involved challenges to criminal convictions by two Indians; only one conviction involved a jail sentence. In referring to both *Barta* and *Iron Crow*, the Senate Committee Report expresses concern over due process requirements in taxation.[12]

The focus on these cases was not confined to the Committee. When the bill (S.1843, 90th Cong.) was introduced into the Senate, Senator Ervin inserted an analysis of the same seven cases into the Congressional Record. 113 Cong. Rec. 13474 (1967). The same cases were also pointed out to the House Subcommittee in its hearings just prior to enactment of the ICRA.[13]

By contrast, there is no support in the legislative history for an intent to confine all remedies for rights violations to habeas corpus. Defendants are correct when they say that the hearings generally emphasized criminal proceedings rather than civil ones (though they exaggerate the degree of emphasis). But the Judiciary Committee Report does not do that, and even the hearings and Staff summaries do not anywhere emphasize criminal proceedings culminating in a jail sentence over other proceedings. It is natural to be

[12] *Id.* at 10.

[13] 1968 House Hearings, *supra* note 6, p. 17.

somewhat more concerned as a general matter about rights of the accused, but this hardly negates concern over other rights.

The general rule regarding equitable remedies for constitutional violations was stated in *Bell v. Hood*, 327 U.S. 678, 684 (1946):

> [I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and and to restrain individual state officers from doing what the 14th Amendment forbids the state to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute [28 U.S.C. § 1331] provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the the wrong done.

See also, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 396 (1971) and 403 U.S. at 400 (concurring opinion of Justice Harlan discussing equitable remedies); *Ex parte Young*, 209 U.S. 123, 163-65 (1908) (discussed further below at pager 19-22).

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court reviewed 42 U.S.C. § 1982, declaring equal rights to property ownership. Despite the lack of an explicit method of enforcement in the statute, the Court found federal district court jurisdiction to grant equitable relief pursuant to the statute and 28 U.S.C. § 1343(4). 392 U.S. at 412 n.1, 414 n.13. The statute in that case did not specify who was being limited by it, nor did it directly apply verbatim constitutional language. By contrast the Indian Bill of Rights is quite specifically imposed on Indian tribes and embodies rights directly taken from the Constitution.

The equitable power of the federal courts described by this Court in the cases just cited has traditionally been characterized as an inherent power of the courts exercised in accordance with principles of equity evolved from the chancery courts. Congress has recognized this by occasionally acting to limit the power. *E.g.*, 28 U.S.C. §§ 1341, 2283. By contrast, habeas corpus has for many years been governed by statute. 28 U.S.C. §§ 2241-55. The Constitution (art. I, § 9, cl. 2) limits Congress' ability to control the writ, but the practice of defining the remedy by statute is well established. Congress followed this practice by including in the ICRA a statutory right of habeas corpus. 25 U.S.C. § 1303. This section also substitutes for the constitutional limitation itself, to which the tribes may not be subject. In light of these traditions, congressional intent to deny normal equitable remedies should not be implied from a habeas statute absent the clearest indications.

D. *Tribal Sovereign Immunity.*

Tribal sovereign immunity as a bar would defeat the same general and specific purposes manifested on the face of the Indian Bill of Rights and in its legislative history, as discussed in the previous two sections. It would undermine the intent to afford persons under tribal jurisdiction the same constitutional rights as others. On this basis, the circuit courts have held the Indian Bill of Rights to set aside tribal immunity in cases where it applies.[14]

The legislative history supports the view of the circuit courts. The sovereign immunity of the tribes was repeatedly referred to as one of the basic problems giving rise to the need for the legislation, and there is repeated reference to federal authority to limit tribal sovereignty. For example, the 1966 Subcommittee Staff Report of Hearings begins with a two and one-half page discussion titled, "Tribal Sovereignty and Its Limitation by Federal Authority."[15] *See also* the Senate Committee Report's discussion of the same subject.[16] It is clear that the Senators knew full well that the very enactment of an Indian Bill of Rights would be a federal limitation on tribal sovereignty.

[14]Cases cited above at page 11.

In considering a claim of sovereign immunity, it is important to distinguish between actions such as this one, seeking equitable relief against future conduct of a government violating basic constitutional rights, from others, particularly actions seeking damages from the governmental treasury for past wrongs. (Plaintiffs here do not seek damages.) The judicial power of the United States has long been held to extend to actions for equitable relief from the future unconstitutional acts of governmental officers. *Ex parte Young*, 209 U.S. 123 (1908); *cf.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). By contrast actions for money judgments (or even equitable restitution) for past wrongs have required explicit waivers of immunity. *Edelman v. Jordan*, 415 U.S. 651 (1974). Actions involving title to property and certain kinds of contract rights involve still other precedents. *E.g.*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *United States v. Lee*, 106 U.S. 196 (1882).

Defendants and their *amici* ignore these distinctions.[17] However, many of the negative consequences they claim would follow from a ruling that the Indian Bill of Rights limits tribal immunity must be recognized as consequences only of money judgments against tribes. *E.g.*, Pet. 19. Plain-

[15]1966 Staff Report, *supra* n.5, at pp. 1-3

[16]S.Rep. 841, 90th Cong., 1st Sess., pp. 7-8 (1967).

[17]Many of the precedents they cite for tribal sovereign immunity were actions seeking money judgments against tribes. *E.g.*, United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940). All the general law precedents they cite on the standards for waiver of immunity were actions for money judgments. *E.g.*, United States v. King, 395 U.S. 1 (1969).

tiffs submit that actions against tribes for damages present quite different issues from this case.[18]

It is true that federal judicial power to grant equitable relief from the unconstitutional acts of governments has traditionally been exercised in actions against the appropriate governmental officer rather than against a state or the United States by name. The ostensible theory is that a government official's unconstitutional acts are not the acts of the government and thus not shielded by sovereign immunity. *Ex parte Young, supra.* However, this theory has long been recognized as a fiction, since the officer-defendant acts pursuant to his official authority, and the effect of equitable relief is generally the same as if the government itself were a party.[19] Also, the fiction is recognized as in deference to the eleventh amendment where the states are concerned and to the constitutional status of co-equal branches of government where the federal government is concerned.[20] Congress has recently expressly recognized the artificiality of the situation by amending the Administrative Procedures Act to allow the United States to be named as a defendant in actions arising thereunder.[21] Congress did this in recognition that "[a]ctions challenging official conduct are intrinsically against the United States and are now treated as such for all practical purposes."[22] Also in recent years states have often defended on the merits federal court actions for equitable relief naming the state as a defendant.[23] Those cases are tacit recognition of the practical effect of *Ex parte Young*.

[18]No circuit court of appeals has yet sustained a money judgment against an Indian tribe under the ICRA; the decisions cited above at pp. 10-11 involve equitable relief.

[19]C. Wright, Law of Federal Courts, p. 186 (2d ed. 1970); 3 K. Davis, Administrative Law Treatise § 27.03, p. 553 (West 1958).

[20]*Id.*

[21]Pub. L. 94-574, 90 Stat. 2721 (1976).

[22]H.Rep. 94-1656, 94th Cong., 2d Sess. p. 11 (1976).

[23]*E.g.*, Sosna v. Iowa, 419 U.S. 393 (1975); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

All four of the circuit courts sustaining jurisdiction to grant equitable relief for ICRA violations have allowed the entry of such judgments against tribes by name.[24] Both lower courts in this case did the same. The issue in this context has not been contested in prior cases (nor has it been in this case), but there has been discussion of the difference in parties in a few cases.[25] Although plaintiffs named both the Pueblo and its principal executive officer as defendants, plaintiffs contend that the Pueblo is a proper party defendant. The Indian Bill of Rights by its terms is a limitation on all governmental powers possessed by Indian tribes and on all tribal "offices, bodies and tribunals." The tribes are constitutionally subject to the direct and plenary control of Congress (as defendants concede, Pet.Br. 11); neither the eleventh amendment nor the constitutional status of a co-equal branch of the federal government requires the fiction of *Ex parte Young*. The only effect of applying the fiction to ICRA cases is to force litigants to select which officers to sue, a process bearing no relation to the merits of an action. The ICRA is sufficient authority to enter judgments against the tribes by name, which the lower courts have correctly allowed.

The right to redress against overbearing and unconstitutional government action represented by *Ex parte Young* has long been a basic rule of constitutional law. As Professor Wright states, "[T]he doctrine of Ex parte Young seems indispensable to the establishment of constitutional government and the rule of law."[26] In light of this well-established principle, and of Congress' clear intent to guarantee to persons under Indian tribal jurisdiction the "same" rights as

[24]*See generally* cases cited above at pages 10-11.

[25]*E.g.*, Means v. Wilson, 522 F.2d 833, 841 (8th Cir. 1975); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 934-35 (10th Cir. 1975).

[26]C. Wright, Law of Federal Courts, p. 186 (2d ed. 1970).

other Americans and to remedy the injustice of prior cases denying relief in non-custody cases, it is inconceivable that Congress did not intend traditional equitable relief to be available.

E. *Conclusion.*

For the reasons stated in the sections above, this Court should sustain federal court jurisdiction to award equitable relief against Indian tribes and their officers for violations of the Indian Bill of Rights.

II. PLAINTIFFS SHOULD PREVAIL ON THE MERITS

Defendants and their *amici* make two kinds of arguments on the merits: they contend that 25 U.S.C. § 1302(8) is a different (and weaker) standard than the corresponding fourteenth amendment standards; and they contend that even if the standard is the same, the 1939 Ordinance furthers valid governmental interests of the Tribe. Plaintiffs disagree with both propositions. However, as set out below, plaintiffs agree that application of these standards in a tribal context will differ from application in a state or federal one.

A. *Section 1302(8) Embodies the Same Standards as the Constitution.*

The due process clause of § 1302(8) is worded the same as the federal and state equivalents. The equal protection clause of § 1302(8) is virtually the same as that of the fourteenth amendment, but one word is different. The fourteenth amendment guarantees equal protection of "the" laws, while § 1302(8) guarantees equal protection of "its" [the tribe's] laws. Two *amici* briefs attempt to make something of this difference, though it is uncertain what their standard is.[27] Since we are here concerned with both a tribal legislative standard and tribal enforcement of it, the literal

[27]Br. of National Tribal Chairmen's Ass'n. 15; Br. of Confederated Tribes of Colville Reservation 14.

terms of § 1302(8) are satisfied in any event. But the legislative history indicates that the changed word has little if any significance. In the sole committee report on the bill which became the ICRA and twice in describing the bill on the floor of the Senate, the sponsors used the phrase "the laws" to explain the meaning of the statutory phrase "its laws."[28]

Furthermore, as noted above the legislative history is replete with indications that constitutional standards were being applied to the tribes.[29]

The history of equal protection in the bills leading to the ICRA is not without interest. As noted above,[30] Senator Ervin introduced bills imposing constitutional limitations on Indian tribes in three successive Congresses. The bills in the 88th (S.3047) and 89th (S.961) would have imposed on the tribes those constitutional restrictions that limit the federal government. This would include the fifth amendment, which has no equal protection clause, although it has been held to impose equal protection limitations.[31] The Interior Department then offered an enumerated list of rights as a substitute, and the Senate Subcommittee accepted this recommendation with one exception: equal protection. The Interior bill included a provision prohibiting the denial of equal protection to "members of the tribe" only. The Subcommittee changed this to "persons" in the bill which became the ICRA.[32]

[28]The report is S.Rep. 841, 90th Cong., 1st Sess. (1967); compare the bill's text at p.2 with the explanation at p. 14. The bill was introduced on May 23, 1967, 113 Cong. Rec. 13473 (1967); compare the bill's text at p. 13473 with the explanation at p. 13475. It was discussed again on December 7, 1967, the day it passed the Senate. Compare the bill with its description at 113 Cong. Rec. 35474 (1967).

[29]*See* discussion above at pp. 13-14.

[30]*See* discussion above at p. 12.

[31]*E.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

[32]D. Burnett, An Historical Analysis of the 1968 Indian Civil Rights Act, 9 Harv.J.Leg. 557 at 602 n. 239 (1972).

This history refutes an extremely misleading suggestion made in three *amici* briefs.[33] They quote without explanation the 1966 Summary Report of the Senate Subcommittee, which states that the Interior Department's bill differs from the fourteenth amendment's equal protection clause "in some respects."[34] However, the quoted language refers to the Interior Department's draft bill prohibiting the denial of equal protection only to "members of the tribe." This language of course differs from the fourteenth amendment. But the Senators rejected this more limited language and substituted "persons" in what is now § 1302(8), making it virtually identical to the fourteenth amendment.[35] One commentator termed this a "critical point."[36]

Since plantiff Julia Martinez is a Pueblo member, even the Interior bill would have protected her. But the history above demonstrates that the Senate Subcommittee made a deliberate decision to reject a more limited equal protection clause, even as it carefully omitted the fifteenth amendment and the first amendment anti-establishment clause from the ICRA out of deference to the tribes.

Defendants and their *amici* suggest one concrete version of a weaker equal protection standard, that § 1302(8) should require no more than so-called "even-handed application" of existing tribal law. Pet. 27. The opinion of the district court suggests the same standard. 402 F.Supp. at

[33]Br. of National Tribal Chairmen's Ass'n 18-19; Br. of Pueblo de Cochiti, *et al.*, 5; Br. of Confederated Tribes of Colville Res. 15.

[34]1966 Summary Report of Hearings, *supra* n.5, p. 25.

[35]The Report's language was erroneously cited by an earlier panel of the Tenth Circuit, which also failed to note that the language applied to a rejected version of the equal protection clause. Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971). The error in that opinion is then quoted, again in error, in White Eagle v. One Feather, 478 F.2d 1311, 1313 (8th Cir. 1973) and in Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1082 (8th Cir. 1975). The mischaracterization of this language should go no farther.

[36]D. Burnett, *loc. cit. supra* n. 32.

17; Pet. pp. 24a-25a. However, this "standard" bears no relationship to the purposes of the equal protection clause. This merely amounts to an arbitrary division between differential treatment of persons by the administrative organs of a government as opposed to the legislative organs. According to this "standard," an individual can challenge administrative classifications, but legislative ones are immune. There has never been such a line drawn in equal protection analysis. In fact, administrative differentials can be sustained, just as legislative ones can be struck down. The equal protection clause protects against invidious discriminations by all branches of a government. This is expressly codified in the ICRA, which by its terms limits "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial." 25 U.S.C. § 1301(2).

Of course there are occasions where a legislative classification is justified because it significantly furthers a legitimate governmental purpose, but uneven administration of the same rule would not be justified. *E.g., Daly v. United States*, 483 F.2d 700, 705-06 (8th Cir. 1973). However, this situation can be reached only *after* a legislative differential is found to be justified. Immunity of all legislative rules would completely undermine the purposes of the equal protection clause. The most arbitrary discriminations can be embodied in a legislative standard. A tribal statute forbidding the vote to left-handed persons could not violate equal protection so long as consistently applied. Congress cannot possibly have intended such an empty undertaking.

One other consideration should bear on interpretation of 25 U.S.C. § 1302(8). As defendants point out, there is a line of precedent holding that the specific provisions in the Constitution limiting federal and state governmental actions are not direct limitations on Indian tribal governments. The leading case is *Talton v. Mayes*, 163 U.S. 376

(1896), which held the fifth amendment's requirement of indictment by grand jury inapplicable to the Cherokee Nation in Indian Territory. However, as the Court noted in the *Talton* decision itself, this was at a time when most Bill of Rights guarantees had not been directly applied to the states either. 163 U.S. at 382.

A different version of this issue was presented by the non-Indian territories. In *Downes v. Bidwell*, 182 U.S. 244 (1901), a sharply divided (5-4) Court ruled that the Constitution does not *ipso facto* apply to acquired territory until and if Congress applies it by statute, although when Congress does so, the decision is irrevocable. This ruling is part of the "incorporation" doctrine regarding the status of territories. But even the majority opinion acknowledged that the inhabitants of such "unincorporated" territories are entitled to certain "natural" or "personal rights," including rights "to due process of law and to an equal protection of the laws." 182 U.S. at 282. *See also, Territory of Hawaii v. Mankichi*, 190 U.S. 197 (1903) and *Dorr v. United States*, 195 U.S. 138 (1904), stating in dictum that "fundamental" rights are protected by the Constitution "wherever the jurisdiction of the United States extends." 195 U.S. at 148.

This Court has never ruled on a case presenting the question whether an Indian tribal government can deny any person within its jurisdiction rights deemed fundamental whether or not all the specific constitutional limitations apply to the tribes. *Talton v. Mayes, supra*, is not such a case. The Court of Appeals in *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965), distinguished *Talton v. Mayes, supra*, and expressed doubt about the inapplicability of the Constitution to Indian tribes. 342 F.2d at 377. *Cf., Marsh v. Alabama*, 326 U.S. 501 (1946).

The legislative history of the ICRA indicates that Congress was aware of the *Colliflower* decision when it deliber-

ated the bills leading to the ICRA. *Supra* n. 11 and accompanying text. The enactment of the ICRA may well have resolved future extensions of the *Colliflower* ruling under the Constitution itself.

Plaintiffs have not sought relief under the Constitution itself and do not do so now. But they do contend that Congress' awareness of the question of fundamental constitutional rights of persons under the jurisdiction of Indian tribal governments, focused by the *Colliflower* decision, is further evidence that Congress intended the Indian Bill of Rights to be closely patterned after the Constitution itself. The contrary conclusion would render Congress' effort to resolve the *Colliflower* problem ineffective. *Cf.*, Note, 82 Harv.L.Rev. 1343, 1346-53 (1969).

B. *Equal Protection and Due Process Review in a Tribal Context.*

Although the legal standards of 25 U.S.C. § 1302(8) are the same as their fifth and fourteenth amendment antecedents, application of these rules in the context of an Indian tribe with distinct cultural traditions and social organization will and should differ from the federal and state contexts. This view is directly supported by decisions of this Court sustaining laws singling out Indians for separate treatment against fifth and fourteenth amendment challenges. *United States v. Antelope*, — U.S. —, 51 L.Ed.2d 701 (1977); *Fisher v. District Court*, 424 U.S. 382 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974). These decisions hold that laws dealing only with Indians are justified by the historical and legal status of Indian tribes as separate peoples entitled to self-government. These decisions also indicate that, contrary to the warnings of defendants and their *amici*, the equal protection clause poses no threat to legitimate tribal interests.

The equal protection clause requires that differential treatment by a government must significantly further a legitimate governmental purpose. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-76 (1972). A body of precedent has developed defining certain individual interests as fundamental, and classifications infringing such interests bear a greater burden of justification. *Id.* Thus, equal protection analysis requires both a determination whether the claimed governmental interest is in fact significantly served by the rule at issue, and a judgment about the relative importance of the individual and governmental interests involved. For example, in a sex discrimination case the Court stated: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, — U.S. —, 50 L.Ed.2d 397 (1976).

Plaintiffs submit that the inquiry whether the government's means are substantially related to the government's ends does not interfere with any justifiable interest based on a differing culture and society. On the other hand, judgments about the relative importance of individual and governmental interests will in some instances involve distinct social or cultural standards. Given the purpose of the ICRA to guarantee basic rights, non-Indian precedents defining fundamental rights cannot be ignored in examining a tribal rule. But tribes should have the opportunity to demonstrate that a particular individual right should be viewed as less important in the tribal context. Individuals should have the opportunity to show the opposite. Tribes should also be able to show that denial of a very important right is nevertheless justified because it is incompatible with the separate political status of the tribe. Racial affinity to a tribe is, for example, a clearly justifiable basis for a tribal classification, while a tribal classification favoring whites over blacks would not be justified.

Application of the relevant form of due process analysis is similar. The Court has held that conclusive and irrebuttable presumptions which burden important personal liberties deny due process of law. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). One of the basic concepts of due process is the opportunity to be heard on important questions of liberty and property, and conclusive, irrebuttable presumptions deny that opportunity. *Id.* As in equal protection analysis, the government's interest in maintaining the rule at issue is to be considered. *Id.* Here again, Indian tribes should have the opportunity to show that an interest deemed very important in due process precedent should be less so in the tribal context, and individuals should have the chance to show that interests not recognized as important elsewhere are fundamental in the tribal context. And the unique tribal interest in separate status should be recognized as a justification.

Plaintiffs contend that application of this analysis to the facts of this case clearly demonstrates that the 1939 Ordinance is not justified by any legitimate interests of the Santa Clara Pueblo.

C. *Constitutional Precedents Regarding the Rights of Plaintiffs Denied by the Ordinance.*

The 1939 Pueblo Ordinance discriminates against plaintiff Julia Martinez on the basis of her sex. She is penalized in her choice of a spouse in a way that her male counterpart is not, and she is prevented from passing her house and land use rights to her children. 402 F.Supp. at 14-15, Pet. 17a-19a. Sex discrimination has been found to deny equal protection in a variety of contexts.[37] Also, "[t]his Court has

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[37]Califano v. Goldfarb, — U.S. —, 51 L.Ed.2d 270 (1977); Craig v. Boren, — U.S. —, 50 L.Ed.2d 397 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Reed v. Reed, 404 U.S. 71 (1971).

long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause . . .". *Cleveland Board of Education v. LaFleur, supra,* 414 U.S. at 639.

The Ordinance's impact on the Martinez children is extremely grave. They are discriminated against on the basis of ancestry — male line versus female line. There are no precedents concerning this form of ancestry discrimination, though other forms have been frequently invalidated, *e.g., Hernandez v. Texas,* 347 U.S. 475 (1954); *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972). The present consequences of this discrimination deny the Martinez children the right to vote, considered fundamental because "preservative of all rights,"[38] and other political rights. They are denied the chance to obtain a land use permit to make a permanent home, and they can stay in the Pueblo only by living with their mother or other relatives who are members. Pueblo Const. art. VII, A. 6-7; 402 F.Supp at 14, Pet. 18a.

The likely future consequences are far more serious. Only members have the right to remain in the Pueblo. Pueblo Const. art. VI, § 1, cl. 5; A. 4. The Martinez children are in a most precarious situation. Should their mother predecease them and no other member relative take them in, they will have no place to live in the Pueblo and be forced to leave their lifelong home. This possibility poses no ordinary threat, because of the unique language, religious, and other cultural ties they have to the Pueblo. Plaintiffs contend that this unique interest of persons raised in a lawfully separate culture and society should be deemed fundamental in an Indian tribal context. The very values and interests espoused by defendants in the cultur and religion of Santa Clara strongly support this contention. Because of such

[38]Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

values, an opinion of the Solicitor of the Department of the Interior holds that tribal membership is a fundamental right subject to the restraints of 25 U.S.C. § 1302(8). 76 I.D. 353 (1969).

Turning to due process, defendants attempted to justify the 1939 Ordinance based on the claim that Santa Clara children are customarily raised in the culture or ideology of the male parent, so that the Ordinance serves cultural preservation. Tr. 97-98. The district court did not so find, but ruled as it did "assuming" that the Ordinance is "actively destructive of the cultural identity of the Pueblo." 402 F.Supp. at 18, Pet. 26a. In any event, it is apparent that the claimed policy behind the 1939 Ordinance is based on a conclusive presumption that children raised in a family with a non-Santa Clara father will not follow the language, religion or culture of Santa Clara. The Martinez children are not permitted any opportunity to rebut this presumption. Given the important personal rights they are denied, due process precedents would invalidate this rule absent very strong justification by the government.[39]

In summary, the Ordinance denies plaintiffs extremely important personal rights and liberties. Constitutional precendents would clearly invalidate it in the federal or state contexts. Under these circumstances, plaintiffs contend that defendants bear a heavy burden of justification.

D. *Defendants' Claimed Purposes Are Not Served by the 1939 Ordinance.*

At trial the governmental interest argued by defendants was the claim that the 1939 Ordinance is needed to preserve the Santa Clara religion and culture. Tr. 78-79; *see also,* Pet. Br. 9. Plaintiffs agree that the religion and culture are indeed very important but dispute the claim that the 1939

[39]Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

Ordinance is supportive of either, or that it was intended to be.

The trial court expressly found the Ordinance to be completely unrelated to the Pueblo religion. 402 F.Supp. at 16, Pet. 21a. Defendants indirectly disagree, because they continue to allege religious importance (though they do not directly dispute the trial court's finding), *e.g.*, Pet. Br. 9. However, the evidence overwhelmingly supports the finding. It is undisputed that the Martinez children are admitted into the Pueblo religion. *Id.;* Tr. 147. Defendants' witnesses stated that the religion is not open to outsiders and that one must know the Tewa language to practice it. Tr. 167, 218-19. A religious leader of the Pueblo, Mr. Alcario Tafoya, testified to the same effect. Tr. 372. He also testified that members of the plaintiff class represented by Audrey Martinez have been initiated into the Santa Clara religion. Tr. 371. By contrast, one of the defendants' witnesses was Mr. Amarante Silva, a tribal official, whose wife is Navajo. He testified that he does not teach his children (who are, of course, members under the 1939 Ordinance) the Tewa language which is necessary to the religion. Tr. 187. Nor does he practice the religion himself. Tr. 190. Thus defendants' wholly conclusory claim that fathers are the teachers of the Pueblo religion is plainly contradicted by the facts. A widely respected published source reports that, in fact, a "prestigeful and influential older male adult" in an extended family group is the dominant influence.[40]

Turning to non-religious cultural matters, the trial court's findings are equivocal. The court found that the 1939 Ordinance was "a break with tradition" but was "rooted in certain traditional values." 402 F. Supp. at 16; Pet. 21a. But the trial court's more important view on tradition was its ruling that it would not decide whether defendants' claim

[40]E. Dozier, Factionalism at Santa Clara Pueblo, 5 Ethnology No. 2, p. 172, April, 1966 at 172-73. *See* discussion of this work below at pp. 41-42.

that the 1939 Ordinance is needed for cultural survival is true or not. 402 F.Supp. at 18, Pet. 26a. In fact, as noted above, the court was willing to assume that the Ordinance is destructive of Santa Clara culture. *Id.* Why the court felt competent to rule on the evidence concerning religion but not that concerning non-religious cultural matters is not explained, but in any event, the trial court's refusal to judge the cultural evidence was error.

In the first place, it is defendants who made the claim that the 1939 Ordinance is essential to Santa Clara culture; plaintiffs sought only to refute their claim. Tr. 78-79, 139-40. In the second place, the naked claim of a nexus with culture and tradition — a nontraversable plea under the trial court's view — can quite obviously be made in any ICRA case by any tribe.[41] There will inevitably be some cultural influence on virtually every tribal action.

Plaintiffs submit that an examination of the effect of the Ordinance and the evidence demonstrates that defendants failed to show any way in which the Ordinance furthers the end of preserving Santa Clara culture.

The Ordinance mandates the exclusion of female-line children and mandates the admission of male-line children. These rules are applied without regard to religious or cultural affinity to the Pueblo. Male-line children of half or less Indian ancestry, raised away from the Pueblo, knowing nothing of its language, culture, religion or traditions are automatically members. Actual examples of such situations appear in the record. Tr. 202, 342-43. By contrast the Martinez children have known no home but the Pueblo, speak its language, and are admitted to its ancient religion. The Court of Appeals correctly concluded: "The Tribe has

[41]States also make such claims in fourteenth amendment cases, *e.g.*, Samuel v. University of Pittsburgh, 375 F. Supp. 1119 (W.D.Pa. 1974), *appeal dismissed*, 506 F.2d 355 (3rd Cir. 1974).

not shown how such an incongruous and unreasonable result fosters and promotes cultural survival." 540 F.2d at 1047, Pet. 43a.

Defendants' witnesses claimed to be concerned about cultural outsiders coming into the Pueblo. *E.g.*, Pet.Br. 28. However, as the Court of Appeals expressly noted, the effect of the Ordinance is not to exclude cultural outsiders. "The Martinez children . . . are persons within the cultural group who have been allowed to develop a substantial stake in the life of the Tribe." 540 F.2d at 1048, Pet. 45a. A law review note reasons that a tribe should have significantly less authority to expel cultural insiders than to exclude true outsiders.[42]

The intent and purpose of the 1939 Ordinance were to hold down the size of tribal membership so there would be plenty of money and land for the members. 402 F.Supp. at 15, Pet. 20a; 540 F.2d at 1047, Pet. 44a. This factor was strongly emphasized by defendants' witness at trial. Tr. 136, 155, 166, 187-88, 343-44. (The last reference is to the testimony of Mr. Pat Gutierrez, one of the signers of the 1939 Ordinance itself.) As the Court of Appeals noted, if this were the problem it was made out to be, it could have been solved without resort to discrimination. 540 F.2d at 1047, Pet. 44a.

Racial affinity to the Tribe is undoubtedly a legitimate tribal interest. It follows that mixed marriages are a valid area of concern. But the 1939 Ordinance is a wholly arbitrary and irrational response to that interest. The facts in this record make clear that this dispute is not over the legitimacy of the Pueblos claimed purposes to maintain the Santa Clara religion and culture — ends which plaintiffs themselves embrace. It is rather with the means chosen to promote those ends, means that not only fail to serve them

[42]Note, 82 Harv.L.Rev. 1343, 1363 (1969).

but are actually counter-productive. As noted above (in part II. B.), this inquiry affects no legitimate cultural interest of the tribe. This Court is not asked to decide whether the Pueblo's claimed purposes are important or not — only that the Ordinance fails to further them. For these reasons, the claims of defendants and their *amici* of undue federal court interference with the Pueblo's culture are wholly unwarranted.

E. *Santa Clara Tradition.*

As already noted, the district court did not sustain dedendants' claim that the 1939 Ordinance furthers the preservation of Santa Clara religion and culture. To the contrary, the court ruled that the Ordinance is unrelated to the religion and that the Martinez children "are, culturally, for all practical purposes Santa Clara Indians." Instead the court relied on its finding that the Ordinance is "rooted in certain traditional values." 402 F.Supp. at 16, Pet. 21a. The Court of Appeals correctly rejected this ruling as a justification for the Ordinance.

A claim of tradition cannot alone justify a tribal law; many traditions will manifestly be antithetical to the Indian Bill of Rights. The inquiry must be that discussed in the previous sections. Also, the Pueblo has not claimed that the purpose of the 1939 Ordinance was to preserve the traditions to which the district court referred. In any event, the tie between these traditions, if in fact they exist at all, and the 1939 Ordinance is extremely tenuous at best. The district court's comment that in its intent and purpose the Ordinance represented a "break with tradition" is much more accurate.

The district court found that the Pueblo "was" patrilineal in both surnames and kinship, that is, both are traced through the father rather than the mother. Plaintiffs agree that the Pueblo has been patrilineal in surnames since the Spanish conquest, but as set out in section G below, they

challenge the statement that it is patrilineal in kinship, because there is no evidence whatsoever to support the finding, and there is strong evidence to the contrary.

The district court also found that the Pueblo "was" patrilocal in residence pattern, that is, martial domicile followed the male line. For the reasons set out in section G below, plaintiffs contend that this finding is clearly erroneous.

Even if one accepts the findings, they provide no support for the 1939 Ordinance. The district court described these traditions in the past tense and stated that they "have lost much of their force." 402 F.Supp. at 16, Pet. 21a. The evidence is to the effect that they never had much force. Santa Clara Indians have for many years used Spanish surnames passed through the male line, which is of course the Spanish tradition. According to a scholarly source relied upon by defendants' expert witness, Tewa people give these names the same significance as in Anglo-American and Spanish-American societies. The family name "was compared to the Mexican patronymic as having neither more nor less significance . . ."[43] Another of defendants' witnesses, tribal elder Juan Chavarria, testified that the Tewa name given to a Santa Clara child is neither the mother's nor the father's — the custom of taking the father's name refers to the "baptismal" Spanish or English name. Tr. 223, 225-26.

Defendants' expert witness, Dr. Ellis, repeatedly equated the Pueblo tradition with those of the general American society:

> I would say that our own society is also patrilineal and at least has been up to the present, and was very much

[43]E. Parsons, The Social Organization of the Tewa of New Mexico (Amer. Anthro. Ass'n 1929) p. 38. Parsons is listed on the bibliography of defendants' expert, Dr. Ellis, as a source, R.vol.II, Pl. Ex. 1 (Tr. 255), and was relied upon by Dr. Ellis in her testimony. Tr. 246, 258.

> like the Tewa society except that religion was of more importance to the Tewas that it has been in our own society for quite a number of generations.

Tr. 246. *See also* Tr. 317-18.

One other tendency to follow the father appears in the record, but it has nothing to do with the 1939 Ordinance. (Nor was it relied upon by the district court.) For religious purposes the Pueblo was traditionally divided into the Winter and Summer People, divisions anthropologists have termed "moieties." 402 F.Supp. at 12, Pet. 14a. Each moiety conducts its own religious initiation, as explained by a Pueblo religious leader. Tr. 363-64, 370-71. Where a child's parents were of different moieties, the child's affiliation was "usually with the father's moiety but may be changed . . ."[44] However, moiety affiliation is not lineage; "it is primarily a religious grouping." 402 F.Supp. at 12, Pet. 14a. Since it is clear that the 1939 Ordinance is unrelated to the Pueblo religion, the Ordinance is not "rooted in" this tradition.

To put the claim that the Pueblo was traditionally patrilocal in perspective, one must note that mixed marriages prior to the 1930's were rare.[45] In the traditional society marriage out by either sex was frowned upon at Santa Clara, as stated by two of defendants' witnesses. Tr. 182, 216-17. Amarante Silva, who married a Navajo woman and lived on the Navajo Reservation for the eleven years after his marriage (Tr. 176), admitted that he had gone "against the rulings that the old people had." Nonetheless his children are Pueblo members. Tr. 182. In those rare cases, it is clear from the record that the children were judged on a

[44]E. Dozier, Factionalism at Santa Clara Pueblo, 5 Ethnology no. 2 p. 172 (April 1966) at 173. See further discussion of this work below at 41-42. On moiety affiliation, *see also* Tr. 367-68.

[45]R. vol. II Pl. Ex. 1 p. 29 (Tr. 255); Tr. 165, 188.

case by case basis, and there is no indication of any male-line preference. The Pueblo's own constitution codifies this standard (art. II, §1(c); A. 2), and it is supported by numerous instances from the Pueblo's own records of acceptance of female-line children prior to 1939.[46]

This history indicates that even if there were a custom for marital domicile to be set up with the husband's extended family rather than the wife's, in the vast majority of cases, this meant no more than which part of the Pueblo village the couple chose to reside in. It was not used as a basis to exclude children raised in the Pueblo. The connection between such a tradition and the 1939 Ordinance is extremely attenuated.

The traditions relied upon by the district court are forms of male dominance common to most societies. But these traditions are not what plaintiffs complain of; the Ordinance rule, itself a "break with tradition," is only "rooted in" these traditions. 402 F.Supp. at 16, Pet. 21a. Whether or not these roots have any significance, it is clear that the most important reason behind enactment of the Ordinance was the desire to limit distribution of Pueblo economic resources in the face of an expanding population. Before 1939 the Pueblo had been somewhat affluent. It had acquired substantial funds pursuant to the Pueblo Lands Act of 1924, 43 Stat. 636. R. vol. II Pl. Ex. 28 p. 2 (Tr. 335). The practice of making per capita payments to members from these funds apparently began in the 1930's. R. vol. II Pl. Ex. 23 pp. 8-9 (Tr. 335). In 1935, the Pueblo got its first formal BIA membership roll under the Constitution. Pueblo Const. art. II § 1(a); A.1. Strains soon developed over the making of per capita payments to persons on the Pueblo roll but who had moved away from the Pueblo. *See* R. vol. II Pl. Ex. 16 (Tr. 335), a 1938 document. Shortage of money is also cited in discussions about children

[46]R. vol. II. Pl. Ex. 9, 14, 17 (Tr. 335); 540 F.2d at 1047, Pet. 44a.

of mixed marriages. R. vol. II Pl. Ex. 12 (Tr. 335). A 1942 proposal was to charge a fee for recognition of children of mixed marriages. R. vol. II Pl. Ex. 15 (Tr. 335).

Thus the principal concern behind the Ordinance was economic. This concern with money shown in the Pueblo's own records is then the background for the testimony of the Pueblo witnesses which indicated that the purpose of the Ordinance was to save money and other resources. *See* discussion above in section II.D. Plaintiffs do not dispute the right of the Pueblo to control its membership in non-discriminatory ways, but this concern with the public fisc cannot justify the severe consequences to the Martinez children.

Patriarchal traditions like those found by the district court have been rejected by this Court as justifications for much milder forms of discrimination by the state and federal governments.[47] *See also, Samuel v. University of Pittsburgh*, 375 F.Supp. 1119, 1131-34 (W.D.Pa. 1974), *appeal dismissed*, 506 F.2d 355 (3d Cir. 1974), a case where the Anglo-American common law tradition of male domicile was rejected as a justification for discrimination against women. But these traditions, harmless enough by themselves, have become the excuse to exclude the Martinez children from their cultural homeland in order to make sure there is enough land and money for the male-line families — under a rule created, of course, by the all-male tribal council to benefit themselves. (*See* testimony of defendants' witness Amarante Silva at Tr. 187, expressing blatant preference for male members on purely economic grounds.)

Plaintiffs contend that these traditions do not justify the severe penalty imposed upon the Martinez family and should be rejected by this Court.

[47]*E.g.*, Stanton v. Stanton, 421 U.S. 7 (1975); Reed v. Reed, 404 U.S. 71 (1971).

F. *Considerations Particular to Membership.*

The district court's view comes very close to immunizing the entire subject of membership from review. However, this amounts to the view that the Pueblo has a compelling interest in any membership rule, no matter how arbitrary or trivial. In fact, of course, the interest differs greatly from one situation to the next. Defendants as already noted expressed concern over outsiders influencing the culture. But the Martinez children are not by any conceivable measure outsiders. True cultural outsiders have few legitimate expectations of tribal recognition. Cultural insiders, however, have a much greater stake, and the Pueblo's interest in excluding them is much less.

A published opinion of the Interior Department holds that tribal membership is subject to the restraints of 25 U.S.C. § 1302(8). 76 I.D. 353 (1969). Additionally, the legislative history notes specific concern with a prior federal case denying an Indian a remedy in a membership dispute with her tribe.[48] The legislative history also discloses specific disapproval of a hallowed tradition of the Pueblo tribes, that of enforced religious conformity.

The district court noted that the Santa Clara Pueblo was traditionally a theocracy, where religious and political affairs are interrelated. 402 F.Supp. at 12, Pet. 14a. The same was true of the other Pueblo tribes, and some degree of this tradition remains today.[49] Pueblo theocracy involved not only an established religion, but also rigidly enforced conformity to that religion.[50] In response to Pueblo urging, Congress omitted any anti-establishment clause from the Indian Bill of Rights.[51] But Congress expressly guaranteed

[48]Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960, discussed above at pp. 15-16.

[49]E. Dozier, The Pueblo Indians of North America (Holt, Rinehart & Winston 1970) p. 25; A. Ortiz, The Tewa World (U. Chicago Pr. 1969).

[50]*Id.*

[51]Note, 82 Harv.L.Rev. 1343, 1361 (1969).

the right of free exercise of religion in direct response to evidence of its denial by the Pueblos and Navajos.

An Interior Department witness testified before the Senate Subcommittee:

> I have in mind a situation which arose some years ago where a number of Indians in one of the pueblos joined the Native American Church, the "peyote" church. The rest of the community did not like that and the Governor, in effect, said to these people that they had, by joining the peyote church, lost their right to use the community land.
>
> Now, that was wholly arbitrary, unwarranted, action in my opinion.[52].

The Subcommittee heard other evidence of religious intolerance.[53] As noted above, the legislative history shows specific disapproval of two reported decisions denying Indians a legal remedy for infringements of free exercise of their religion.[54]

By imposing free exercise, Congress eliminated what remained of one of the most ancient traditions of the Pueblos. In the case of Santa Clara, the matter is fully related by Dr. Edward P. Dozier. Dr. Dozier, who died in 1971, was a member of the Santa Clara Pueblo and a doctor of anthropology. He grew up at Santa Clara and spoke the Tewa language. Tr. 258, 296. He wrote about his tribe in a 1966 article, *Factionalism at Santa Clara Pueblo.*[55]

[52]1962 Hearings, *supra*. n. 3 at p. 98.

[53]*E.g.*, 1965 Hearings, *supra*. n. 3 at p. 163.

[54]*See* discussion above at pp. 15-16.

[55]5 Ethnology no. 2 p. 172 (April 1966). Because this article is the best and most concise published description of Santa Clara Pueblo society, copies are being lodged with the Clerk for the Court's convenience. This is also done in response to defendants' reliance on a post trial, out-of-court affidavit of their chief trial witness filed with this Court. Pet.Br. 24-25 citing Br. of *Amici Curiae* in support of Certiorari of the Pueblo de Cochiti, *et al.*, App. K.

According to Dozier, nonconformity to religious requirements of the Pueblo was considered a serious wrong by the traditional society. *Id.* 175. Dissidents were dealt with by either forced expulsion or voluntary departure from the Pueblo. *Id.* 175. This "skimming off' of nonconformists left the Pueblos "oriented along traditional lines with populations restricted to those who valued communal living." *Id.* 183. During the 19th Century, the Pueblos actually declined in population, partly as a result of the alienation of nonconformists. *Id.* 175. As early as 1744, there is a reported Spanish legal case of a dissident Santa Claran expelled for nonconformity. *Id.* 175-76. Such expulsions are also discussed in E. Dozier, *The Pueblo Indians of North America*, (Holt, Rinehart & Winston 1970) at pages 82-83.

Thus traditional membership at Santa Clara involved residence at the Pueblo and rigid, religious conformity. For Santa Clara, these requirements ended with the adoption of its 1935 constitution, as the Dozier article relates.[56] But for many Pueblos, enforced religious conformity was still the rule at the time the Indian Bill of Rights was adopted.

This discussion shows that the Indian Bill of Rights intentionally eliminated one of the most significant traditional features of Pueblo membership: religious conformity. As Dozier points out, the earlier (1935) change at Santa Clara was itself brought about by the pressures of Anglo society and with the guidance of the Bureau of Indian Affairs (BIA). It is an irony that the trial court interpreted the Indian Bill of Rights to leave untouchable a rule that is essentially a "break with tradition" and is based on modern economic problems. The irony is compounded, because the population pressures that led to the 1939 Ordinance were in all likelihood generated in large part by the ending of

[56]One of the defense witnesses, Amarante Silva, illustrates the change. He testified on tradition and is a former tribal councilman but does not practice the traditional Pueblo religion. Tr. 190.

the prior practice of expelling dissidents, a practice which had previously held down the population. In other words, the 1939 Ordinance has to some extent worked as a modern substitute for outlawed religious conformity.

Plaintiffs contend that it is an irrational application of the ICRA to hold that membership rules are essentially immune from any review save unequal application, when a central intent and effect of the Act was to eliminate a much more significant membership rule. To the extent that the truly ancient ways of the Pueblo are a concern, the damage was done long before this lawsuit was filed. Making the Martinez children pay such a great penalty will not restore or preserve the old ways.

This discussion also suggests another problem with the view of the district court. The entire scheme of written, formal membership rolls is an Anglo idea imposed upon an oral society by the Bureau of Indian Affairs. The BIA and Congress have often (though in random ways) imposed membership rules upon the tribes.[57] This is usually for the purpose of distributing money or other property per capita, which was a major problem leading to the 1939 Ordinance, as discussed above. As the Dozier article relates, traditional membership involved conformity to Pueblo ways and was tied to residence within the cultural community. The 1939 Ordinance is very much an adoption of the BIA/Anglo idea of formal, lifetime membership unrelated to conformity or residence. As cultural Santa Clarans, the Martinez children would be members in the traditional society — only under BIA membership concepts are they excluded.

Defendants and their *amici* also contend that the Court of Appeals should be reversed by analogy to this Court's

[57]*See, for example,* 25 U.S.C. §§ 151-65; Wallace v. Adams, 204 U.S. 415 (1907); United States ex rel. West v. Hitchcock, 205 U.S. 80 (1907); F. Cohen, Handbook of Federal Indian Law (U.N.Mex. Reprint of 1942 ed. 1971) p. 98.

decisions in immigration cases, particularly the recent decision in *Fiallo v. Bell*, — U.S. —, 52 L.Ed.2d 50 (1977).

This contention should be rejected for two reasons.

First, the immigration laws of the United States deal with a unique sovereign prerogative, committed by the Constitution to the control of Congress. Art. 1, § 8, cl. 4; fourteenth amendment § 1. Under international law, there is only one sovereign nation within our borders, the United States of America. Under the Constitution, many of the internal powers of the United States are reserved to the states, and we often refer to states as sovereign. Similarly Indian tribes exercise internal sovereignty as permitted by federal law. But despite the internal sovereignty of the states and the Indian tribes, the external sovereign powers of the United States — such as foreign relations and foreign trade — are powers only of the national government. Immigration is such a national power. It is well settled that states cannot control immigration, *Edwards v. California*, 314 U.S. 160 (1941).

This is not to say that tribal membership is the same as state citizenship — it is obviously very different. Plaintiffs recognize that tribes have broad authority and the primary authority over their membership. Plaintiffs do not ask the courts to say what the Pueblo's membership must be — only to prohibit an invidious discrimination. But the power over immigration committed by the Constitution to Congress is also quite different from a tribe's authority over membership. Congress has complete authority to limit tribal membership and in fact has exercised that authority rather frequently to govern property transactions with tribes (see discussion above at page 43.) The question here is wholly statutory, not constitutional.

The second reason the immigration analogy should be rejected is that the Pueblo here seeks to justify an action

whose federal analogy is prohibited even to Congress itself. As noted earlier, defendants seek to deny membership and its attendant rights to children born into Pueblo society and so thoroughly a part of it that both courts below expressly found that culturally they are Santa Clara Indians. The federal analogy would be to deny citizenship and land ownership to persons born in the United States and subject to its authority, a power expressly prohibited by the fourteenth amendment § 1. *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898). That section was enacted in part to overrule the decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), where such a denial was sustained by this Court. In fact the immigration laws deal entirely with true aliens born abroad and seeking to enter this country and become citizens of it. At least since the fourteenth amendment § 1 was ratified, the immigration power has not been available to expel or deny rights to native insiders. Yet that is just what the Pueblo seeks to do.

G. *The District Court's Findings on Pueblo Tradition Are in Part Clearly Erroneous.*

Prior sections of this brief are based entirely on the facts found by the district court, but plaintiffs also wish to correct two erroneous facts stated in the district court's opinion. The disputed findings are that Santa Clara kinship was traditionally patrilineal and that the Pueblo was traditionally patrilocal — in other words, that kinship and domicile generally were expected to follow the male rather than the female line. 402 F.Supp. at 16, Pet. 21a. Plaintiffs do not disagree that the Pueblo has a patrilineal tradition in surnames taken from the Spanish. *Id. See* discussion above at pages 35-36.

(1) Kinship

The sole evidence that Santa Clara was traditionally patrilineal was the testimony of defendants' expert, Dr. Ellis.

While she did indeed testify that Santa Clara was patrilineal, she distinguished kinship. Her direct testimony explaining the matter appears at Tr. 242-46. She defined patrilineal at Santa Clara as taking the father's name and usually his religious moiety. Tr. 242-43. But when it came to kinship matters, she made a distinction (Tr. 245-46):

> Q. Is it your opinion that Santa Clara society is patrilineal?
>
> A. Yes, I would say it was, and I would like to add that parenthetically some anthropologists have said it was a bilateral society. In kinship terms, it is bilateral — that is, father's people and mother's people up to the grandparent generation have the same terms, they are not distinguished.

In her pre-trial paper, she states in its summary, "The fact that the Tewa have a bilateral kinship system . . . indicates a basic sense of sexual equality." R. vol. II Pl. Ex. 1 p. 32 (Tr. 255).

This point is strongly supported by the writings of Dr. Edward Dozier, previously described. Dr. Ellis testified that Dr. Dozier was her most important source. Tr. 258, 282, 296. Her pre-trial paper said the same, R. vol. II Pl. Ex. 1 p. 12 (Tr. 255), and it quotes Dozier extensively. As she pointed out, he was a Santa Clara Indian who grew up at the Pueblo and spoke the Tewa language. *Id.*; Tr. 296. He was also a doctor of anthropology and wrote three works relied on by Dr. Ellis in her preparation for this case. See the bibliography to R. vol. II Pl. Ex. 1 (Tr. 255). Two of these are published: *The Pueblo Indians of North America* (Holt, Rinehart & Winston 1970) and *Factionalism at Santa Clara Pueblo*, 5 Ethnology no. 2 p. 172 (Apr. 1966), which is lodged with the Clerk for convenience (see n. 55, *supra*). The third work is a short, unpublished paper that Dr. Dozier wrote for Dr. Ellis when he was her student at

the University of New Mexico in the 1940's. Tr. 324. This paper is in evidence at R. vol. II Pl. Ex. 2 (Tr. 323). Dr. Ellis repeatedly indicated that Dr. Dozier was the best source on Santa Clara, Tr. 282, 296, and that his three writings above are the best sources on Santa Clara today. Tr. 282.

Dr. Dozier has the following to say about Santa Clara regarding kinship:

Factionalism at Santa Clara Pueblo, supra, states at page 172:

> The essential characteristics of Tewa society and culture may be briefly summarized. Tewa kinship terms are descriptive and bilateral. The household is partially extended to include relatives on either the mother's or the father's side. There is no evidence of a lineage principle in the organization of kinship terms, in the family structure, or in the behavior of its members.

The Pueblo Indians of North America, supra, states at pages 163-64:

> The Tanoan System
>
> Tanoan [including Tewa] kinship terms are descriptive and thoroughly bilateral . . . .
>
> Behavior of kin appears to reflect terminology rather faithfully. The basic social and economic unit of the Tanoan Pueblos before recent economic changes was the bilateral extended family — a kind of minimal descent group.

This is the passage quoted with approval by Dr. Ellis in her pre-trial paper, R. vol. II Pl. Ex. 1 pp. 12-13 (Tr. 255).

The unpublished Dozier paper, R. vol. II Pl. Ex. 2 (Tr. 323), states at page 1:

> The unit of Santa Clara society is the family. Several families are further grouped by feeling of kinship but

without adherence to strictly patrilineal or matrilineal affinity into several family groups.

For these reasons, plaintiffs contend that the district court's finding that Santa Clara Pueblo was traditionally patrilineal in kinship is contrary to all evidence and thus clearly erroneous.

(2) Patrilocal

Defendants' evidence on this point is also chiefly that of Dr. Ellis, although the court relied as well on some exhibits discussed below. Of the other defense witnesses, when asked about patrilocal custom, two supported Dr. Ellis (Mr. Paul Tafoya, Tr. 115, and Mr. Naranjo, Tr. 155), while two others contradicted her (Mr. Baca, Tr. 200, and Mr. Chavarria, Tr. 209).

On direct examination, Dr. Ellis claimed a patrilocal custom for Santa Clara. Tr. 247. Her pre-trial paper and cross-examination testimony qualified this by reporting a custom to move in with the mother's family right after marriage for a short period of time. Tr. 318.

However, she squarely disagrees with her main source, Dr. Dozier. His article, *Factionalism at Santa Clara Pueblo, supra* n. 55, states at page 173 that "residence is ambilocal or neolocal." Dr. Ellis defined "neolocal" as meaning a random residence pattern. Tr. 318.

On this point, Dr. Ellis is also contradicted by Dr. Alfonso Ortiz. His book, *The Tewa World*, is also listed on Dr. Ellis' bibliography for this trial. R. vol. II Pl. Ex. 1 p. 35 (Tr. 255). Dr. Ortiz is a Tewa Indian from the San Juan Pueblo and an anthropologist. A. Ortiz, *The Tewa World* (U. of Chicago Press 1969) p. xi. Ortiz states that in Tewa society "[T]here is no clear postmarital residence rule, . . ." *Id.* p. 45.

Finally, the district court in making its finding expressly relied on 1971 and 1973 absentee voter lists for the Pueblo. 402 F.Supp. at 16, Pet. 21a. These purport to show that at those times about 60 per cent of the listed absentee voters were women. However, the court's reliance on these data is entirely misplaced. For one thing, 60 per cent is not a statistically significant figure on which to base such an absolute concept. But more importantly, these figures are for residence more than 30 years after the 1939 Ordinance had been enacted. During those years, women who married non-members had been subjected to severe discrimination and mistreatment. See the testimony of Julia Martinez (Tr. 34-76) and Floripa Northcutt (Tr. 351-58). Not only have their children been denied membership, but the Pueblo was even unwilling to assist Mrs. Martinez to obtain medical care for her gravely ill daughter. Tr. 45-51. Mrs. Martinez was denied equal access to HUD housing assistance to the Pueblo until after this suit was filed. Mrs. Northcutt, also a member married to a non-member, was denied equal use of Pueblo grazing lands on the ground of her marriage. Tr. 354. After over 30 years of suffering such indignities, it is not suprising that more women than men would be on the absentee voter rolls. Given this discrimination and the statistical preponderance of adult women over adult men in the population at large, the fact that only 60 per cent of the absentee voters are female rather supports the conclusions of both Dr. Dozier and Dr. Ortiz that Santa Clara society is neolocal. The court's reliance on such a statistic to justify the discrimination retroactively cannot be sustained.

For these reasons, plaintiffs contend that the court's finding that Santa Clara society was traditionally patrilocal is clearly erroneous.

CONCLUSION

The 1939 Pueblo Ordinance denies plaintiffs extremely important rights and liberties. The asserted justification amounts to the claim that persons who by any fair standard are completly identified with Santa Clara religion, language and culture must be excluded from Pueblo membership in order to save the culture from destruction. It is manifest that the Ordinance does not in fact significantly further the preservation of Santa Clara religion or culture. The Ordinance therefore denies plaintiffs the equal protection of Pueblo laws and denies them due process of law, in violation of the Indian Bill of Rights, 25 U.S.C. § 1302(8). For these reasons this Court is respectfully requested to affirm the judgment of the Court of Appeals.

August 1977

Respectfully submitted,

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Supreme Court, U. S.
FILED
NOV 22 1977
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO, et al, *Petitioners,*

v.

JULIA MARTINEZ, et al, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

I. THE DISTRICT COURT DID NOT HAVE JURISDICTION

A. Background and Purpose of ICRA

Contrary to Plaintiffs' allegations, the legislative history of the ICRA clearly shows that Congressional intent was to provide for federal judicial review only when an Indian tribe has deprived a person of liberty. The only judicial remedy that Congress provided was the writ of habeas corpus.

It is important to note that Congress did not pass early bills, which were introduced, which would have given the ICRA the breadth and scope Plaintiffs allege that it has. S.962 would have authorized direct appeal of all tribal court criminal convictions to federal district courts with the right of trial de novo, and S.963 would have empowered the Attorney General to investigate complaints of denial of Constitutional rights of Indians by tribes and to bring appropriate criminal or civil actions to vindicate the rights denied.

Both of the above-mentioned bills were opposed by the Interior Department on the grounds that they would unnecessarily burden the federal court system and these bills were not passed. Hearings on S.961, S.962, S.964, S.966, S.967, S.J. Res. 40, to Protect the Constitutional Rights of American Indians, before the Subcommittee on the Judiciary, 89th Cong., 1st Sess., at 19, 23 (1965) (Testimony of Frank Barry, Solicitor of the Department of the Interior). The present habeas corpus provision of the ICRA was then added to S. 1843 Bill as a limited replacement and this was the Bill which was finally passed by Congress. The limitation of judicial review of tribal action to habeas corpus proceedings is a logical compromise by Congress of the competing interests of the protection of the individual's constitutional rights, the burden on the federal judiciary of review of tribal actions, the need to allow tribal governments a large measure of self-autonomy and cultural identity, and the traditional immunity of tribal governments from suit.

Congress intended only to allow a limited intrusion into the internal affairs of Indian tribes when there was an unconstitutional detention of a person and not

to allow review by the federal courts of every tribal action.

B. Equitable Remedies

Plaintiffs' argument that the express habeas corpus remedy is not the sole remedy and that an equitable remedy must be implied to achieve the purposes of the ICRA is invalid.

The line of cases cited by Plaintiffs beginning with *Martinez* v. *Southern Ute Tribe,* 249 F.2d 915 (10th Cir. 1957) cert. denied 356 U.S. 960 and ending with *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89, (8th Cir. 1956) may have been a factor in the consideration of bills concerning the civil rights of Indians but the ICRA as finally passed by Congress was an end product of the balancing of competing interests, as previously described above.

Federal court jurisdiction with implied equitable remedies is not necessary to achieve the purposes of the ICRA. The Secretary of the Interior has the power to disapprove tribal ordinances which are inconsistent with the ICRA. 25 U.S.C. § 476, 18 U.S.C. § 1161. In addition, the ICRA is enforceable in Indian tribal courts. Plaintiffs admit that the ICRA contains no explicit grant of jurisdiction over actions by Indian tribal governments except for habeas corpus, but they argue, and the Tenth Circuit Court of Appeals agreed with them, by incorrectly holding that the District Court had jurisdiction under 28 U.S.C. S. 1343(4) which provides:

> The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person. . .

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of Civil Rights, including the right to vote.

This statute grants jurisdiction only and does not in any way waive tribal sovereign immunity. *Corbean* v. *Xenia City Board of Education,* 366 F.2d 480 (6th Cir. 1966) cert. denied, 38 S.U.S. 1041; *Peterway* v. *Veteran's Administration Hospital,* 495 F.2d 1223 (5th Cir. 1974).

Federal district courts have jurisdiction under 28 U.S.C. S.1343(4), only when a separate act of Congress establishes a cause of action and authorizes suits. The ICRA is not an act "providing for the protection of civil rights". It is a declaration of rights and not a remedy for deprivation of said rights. This Court recently held in *United States* v. *Testan,* 424 U.S. 392 (1976) that the Tucker Act, 28 U.S.C. § 1491, which is analogous to 28 U.S.C. § 1343(4), does not create any substantive rights enforceable against the United States, nor does it waive sovereign immunity. This Court held in *Testan,* that the Tucker Act merely gave jurisdiction to the Court of Claims to render judgment against the United States in appropriate cases.

The recent decision by this Court in *Califano* v. *Sanders,* 97 S.Ct. 980 (1977) is determinative of the issue of whether there is an implied grant of federal jurisdiction in the ICRA. In *Sanders, supra.* the question before this Court was whether federal courts have jurisdiction under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702-706, to review a decision by the Secretary of Health, Education and Welfare refusing to reopen a previously adjudicated claim for

Social Security benefits. Section 10(a) states "A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to a judicial review". This Court reversed the Seventh Circuit Court of Appeals, and denied federal court jurisdiction holding that Section 10 was not phrased like the usual grant of jurisdiction to proceed in the federal courts. Section 10 did not contain an explicit grant of jurisdiction to challenge agency action in the federal courts, and the alleged right to judicial review of agency action was ambiguous. *Id.* at 983, 984.

The Court further held that there was a lack of evidence supporting the asserted congressional intent that Section 10 granted jurisdiction. *Id.* at 984.

The Seventh Circuit's rational for implying jurisdiction, namely that the litigants needed some access to federal courts, was not found to be "compelling" because Congress had recently amended the general federal question statute 28 U.S.C. § 1331(a) to provide federal jurisdiction to review most federal agency actions. *Id.* at 984-985.

The *Sanders* decision is directly in point with the case at hand. As in *Sanders,* there is no explicit grant of federal subject-matter jurisdiction in the Indian Civil Rights Act, and there is no explicit evidence in the legislative history of congressional intent to create the asseted federal jurisdiction. Also, there is no "compelling" reason to imply jurisdiction under the Indian Civil Rights Act, because most tribal actions are reviewable by the Secretary of the Interior and because one can always challenge tribal action under the ICRA in tribal court.

In fact, the *Martinez* case against the implication of federal jurisdiction is far stronger than the case presented in *Sanders,* because the ICRA explicitly grants federal jurisdiction in habeas corpus cases and is silent on any further grant of jurisdiction. Thus, the ICRA expressly provides a limited enforcement mechanism while the APA ensures a general right of federal judicial review of agency action.

Plaintiffs' reliance on *Bell* v. *Hood,* 327 U.S. 678 (1946); *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971); and *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968), in urging this Court to imply federal court jurisdiction in the present case is unwarranted. These cases differed from the present case in that the ICRA provided a specific and sole federal judicial remedy for violation of its terms, the writ of habeas corpus.

Congress provided the federal courts with jurisdiction to enforce the ICRA. It intentionally limited the federal courts to review of unlawful detentions by tribal governments.

C. Sovereign Immunity

Plaintiffs' argument and the Tenth Circuit's holding in this case, that the ICRA is meaningless unless sovereign immunity is waived by implication, because there is no express waiver in the ICRA, is incorrect.

Indian tribes enjoy sovereign immunity from suit unless that immunity has been expressly waived. Puyallup Tribe, Inc. The Department of Game of Washington, No. 76-423, decided June 23, 1977, Slip. op. 7.

The sole remedy in the ICRA of a writ of habeas corpus would be directed only to the individual responsible for the detention and not the Indian tribe itself and therefore this section cannot be read as a waiver of tribal immunity, although it would protect a person against unconstitutional detention.

Plaintiffs further argue that the "Senate knew full well that the very enactment of an Indian Bill of Rights would be a federal limitation on tribal sovereignty", because of some legislative history which even if viewed in the light most favorable to Plaintiffs is no more than ambiguous and equivocal. The Plaintiffs would have this Court accept the untenable idea that Title IV of the ICRA expressly recognized the sovereign power of an Indian tribe to refuse to relinquish criminal or civil jurisdiction over its territory to the States but that other sections of the same Act, by unnecessary implication, abrogated the power of the tribe to withhold its consent to a civil cause of action in federal court.

Plaintiffs continually stress that they seek prospective equitable relief and not monetary damages. However, they do not point out how they propose to limit the results of their requested relief.

If this Court accepts the premise that Indian tribes have no immunity under the ICRA for equitable relief, there would be no logical basis for not allowing civil actions against Indian tribes seeking monetary damages.

The purposes of the doctrine of tribal sovereign immunity are two-fold. The doctrine is a recognition of the sovereignty of Indian tribes and it is also a means to protect the financial existence of the Indian tribes. The Indian tribes cannot afford to be constantly defending their laws, cultures and traditions in federal courts and Congress did not express any intention that they be forced to do so by passing the ICRA.

II. DEFENDANTS SHOULD PREVAIL ON THE MERITS

A. Section 1302(8) Does Not Embody the Same Standards as the United States Constitution

Plaintiffs are in error when they state that the fact Congress was aware of the decision of *Colliflower* v. *Garland*, 342 F.2d 369 (9th Cir. 1965), is evidence that Congress intended the ICRA to be closely patterned after the Constitution itself.

Section 1302(8) provides that no Indian tribe shall:

> . . . deny to any person within its jurisdiction the equal protection of *its* laws or deprive any person of liberty or property without due process of law (emphasis supplied).

The Fourteenth Amendment provides that a State may not "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of *the* laws. U.S. Constitution, Amendment XIV. Sec. 1 (emphasis added).

Only a portion of Sec. 1. of the Fourteenth Amendment is included in Section 1302 and that portion differs significantly from the language of the Fourteenth Amendment.

The legislative history clearly indicates that the equal protection clause of the ICRA was not intended to be identified with the equal protection clause of the Fourteenth Amendment but instead imposed only a duty of even-handed application of the Tribe's laws.

> Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary. United States Senate, 89th Cong. 1st sess. (1965)

> p.18 (Remarks of Assistant Secretary of Interior, Frank Barry).

As the Senate Subcommittee stated in its Summary Report:

> The Department of Interior's bill would, in effect, impose upon the Indian governments the same restrictions applicable presently to the federal and state governments with several notable exceptions, viz., the Fifteenth Amendment, certain other procedural requirements of the Fifth, Sixth and Seventh Amendments, and in some respects, the equal protection requirement of the Fourteenth Amendment. (Emphasis supplied).
>
> Summary Report of Hearings and Investigations by the Subcommittee and Constitutional Rights of the Committee of the Judiciary, United States Senate, 89th Cong. 2nd Sess. (1966) p.25.

Furthermore, the Tribal representatives were assured by Congress that the equal protection guarantee would only require that tribal law be administered fairly; it would not call into question the tribal law itself.

> Hearings on Title II of the Civil Rights Act of 1968 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Congress, First Sess. at 19, 40 (1969) (Remarks of Sen. Ervin).

B. The 1939 Ordinance Is Rationally Related to the Preservation of the Santa Clara Culture

Plaintiffs admit that the application of the equal protection clause of the ICRA in the context of an Indian tribe with distinct cultural traditions and social organization will and should differ from the application in federal and state contexts.

This Court has held that laws dealing only with Indians may pass Constitutional scrutiny where the identical laws if applied to non-Indians would not pass Constitutional scrutiny. This is because Indian tribes are unique sovereign entities and the distinctions allowed them are reasonably related to Indian self-government and Indian cultural autonomy and tribal survival.

United States v. *Antelope*, . . . U.S. . . . 51 L.Ed. 2d 701 (1977), *Fisher* v. *District Court*, 424 U.S. 382 (1976), *Morton* v. *Mancari*, 417 U.S. 535 (1974), *Delaware Tribal Business Committee* v. *Weeks*, . . . U.S. . . . 97 S.Ct. 911 (1977).

Plaintiffs ask this Court to determine whether the 1939 Ordinance significantly furthers a legitimate governmental purpose and to then determine whether the importance of the Tribe's purpose outweighs the importance to the individuals. To apply this type of test requires, as the district court pointed out, that the court determine which traditional values will promote cultural survival and which will not. This determination can be properly made only by the people of Santa Clara Pueblo themselves.

It is impossible for non-Indian jurists, schooled and experienced in the Anglo-American legal tradition, to leave that safe harbor and to venture into a totally unknown culture that pre-dates the founding of this country by centuries. It simply cannot be done. This is proved beyond question by the Court of Appeals decision and by the briefs of Respondent and their amicus. They give weight to economic circumstances but ignore an undisputed record of the deep theocratic and social forces undergirding the disputed ordinance. These an-

alyses unsuccessfully attempt to identify the culture of the Santa Clara Pueblo, to choose those aspects of this ancient culture they believe are worth preserving, and to decide how best to preserve this altered culture. These are inquiries attorneys and federal judges are singularly ill-equipped to handle. That is the reason Congress has never given them that responsibility.

Plaintiffs and their amicus argue that the Pueblo has no cultural stake in the outcome of this case. This is nonsense. The formulation of membership criteria is the ultimate act of tribal self-definition. If the Santa Clarans are unable to determine who is and who is not a Santa Claran, then the cultural autonomy of the Santa Clara Pueblo has been destroyed.

To create for federal judges a role in the government of Indian tribes is a drastic step. It is fundamentally inconsistent with federal Indian policy. Congress, when it passed the ICRA, allowed for such a supervisory role, only in the most serious cases where a writ of habeas corpus is appropriate.

Admittedly this Court in a divided opinion in the case of *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974), did hold that the conclusive and irrebuttable presumption that school teachers in their fifth month of pregnancy were incapable of continuing work was a violation of the due process clause of the Fourteenth Amendment to the United States Constitution. The Court did so on the basis that this presumption was neither necessarily nor universally true, because of the sharply divided medical expert testimony. The Court did indicate, however, that a regulation requiring a termination of employment at some fixed date during the last few weeks of pregnancy might pass Constitutional scrutiny even though the new regulation was also a conclusive and irrebuttable presumption.

The Santa Clara Pueblo submits that reliance on *Cleveland Board of Education* v. *La Fleur,* supra, for a determination of the issues in the present case is unwarranted as the application of due process rights in an Indian context is totally different.

The trial court which listened to and observed the witnesses testify, found that the 1939 Ordinance was rooted in certain traditional values *Martinez* v. *Santa Clara Pueblo,* 402 F.Supp. 5 (D.N.M. 1975). The trial court also found that the Santa Clara Pueblo was traditionally patrilineal and patrilocal and that the membership of [redacted] parents and marriage either within or out of the Pueblo has always been considered a highly significant factor in membership determinations. *Martinez,* Supra. p16. These findings are substantiated by the overwhelming weight of the evidence presented during the trial and the Court of Appeals should not have engaged in independent fact-finding. The district court's findings must stand unless this Court finds them to be "clearly erroneous"; the question is not whether this Court would have reached these same findings. *Zenith Radio Corp.* v. *The Hazeltime Research, Inc.,* 395 U.S. 100, 122-23 (1969); *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485, 495-496 (1950); *United States* v. *Yellow Cab Co.,* 338 U.S. 338 (1949).

Although the district court did not make a finding as to whether the Santa Clara Pueblo was patricultural, matricultural or bicultural, the undisputed testimony of Dr. Ellis (Tr. 330-333) clearly warrants a finding that the Santa Clara Pueblo is a patricultural society.

The above-mentioned findings do justify the Ordinance notwithstanding economic considerations present in 1939, and present today.

Where a group is patrilineal, patrilocal and patricultural, as the Santa Clara Pueblo is, the classifications embodied in the 1939 Ordinance reflect the view that a woman member of the Pueblo who marries outside the Pueblo is more likely to leave it than a male member and the children are more likely to be raised as cultural outsiders. The fact that the women are more likely to take up residence in the community of their husband is borne out by the finding of the trial court that sixty percent of the nonresidents of the Pueblo were women. *Martinez* v. *Santa Clara Pueblo,* supra. P.16. The record does not demonstrate that this statistical imbalance is caused by women leaving the Pueblo because of the exclusion of their children from membership. This is merely one possible hypothesis propounded by the Plaintiffs. The Defendants submit that it is the patrilocal tradition of the Pueblo itself which is the cause of the statistical imbalance.

Plaintiffs charge that the Pueblo was unwilling to assist Mrs. Martinez to obtain medical care for her gravely ill daughter is totally incorrect. Respondent's Brief P.49. (Tr. 23-26, 45-47). The Pueblo had no control over whether or not the Martinez children would obtain medical care. This was a matter solely within the province of the Bureau of Indian Affairs. (Tr. 113-115)

If the Santa Clara Pueblo's intent was only to conserve their limited resources by excluding a certain class of people as members they would not have allowed as an exception to the enforcement of the 1939 Ordinance, the situation of illegitimate children who

are given full membership rights in the Pueblo (Tr. 145). This exception is based on the presumption that the child will remain on the Pueblo and that the child will be brought up culturally as a Santa Claran, even though the granting of membership rights to the child is a dilution of the Tribe's assets.

The Martinez family includes a number of male children. It is noteworthy that while a Martinez girl can conceivably marry a Santa Clara male member and thus gain tribal membership for her children, the Martinez males can never have offspring entitled to membership in the Pueblo. It therefore becomes obvious that what has been attacked as gender based discrimination is in fact not sex based at all.

The Ordinance which has been in effect in writing for thirty-eight years is the embodiment of the collective judgment of the Tribe as to the appropriate classification for the preservation of the Tribe. Although this Ordinance may not provide a "fair" result in every case under Anglo-Saxon concepts of "fairness", no classification, whether blood quantum or otherwise would. It is enough that this Ordinance has a rational basis . . . the preservation of the Santa Clara Pueblo as a distinct sovereign entity with an autonomous culture in our American society. (Tr. 251).

The Court of Appeals should not try to determine which traditional values will promote cultural survival and which will not. They should be concerned only that the Ordinance be applied even-handedly. By determining whether the decision of the Santa Clara Pueblo in enacting this Ordinance was wise and proper, the court of appeals is starting a process which will culminate in the destruction of the cultural identity and very existence of the Santa Clara Pueblo.

Under the position of the Court of Appeals, the Plaintiffs and their amicus, the right of Indian people to govern themselves would be a charade. Sovereignty is truly stripped if a tribe cannot determine who its citizens are; if it must grant citizenship based on alien standards, in the present case, in a way that the record shows, without dispute, would destroy the tribe's culture.

Indian tribes are allowed the right to define and protect their cultures as they see fit and to develop their societies as they choose, even if tribal policies differ from the policies of mainstream America.

This is what is meant by the policy of Indian Self-determination. This is the policy enacted by Congress and it should not be subject to nullification by the courts.

CONCLUSION

The judgment of the Tenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-682

SANTA CLARA PUEBLO, and LUCARIO PADILLA, individually and as Governor of the Santa Clara Pueblo,
Petitioners,

v.

JULIA MARTINEZ, on behalf of herself and all others similarly situated,
and
AUDREY MARTINEZ, on behalf of herself and all other similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION IN SUPPORT OF PETITIONERS

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I.

THE INTEREST OF AMICUS CURIAE

The Confederated Tribes of the Colville Reservation are a recognized Indian tribe, with approximately 5,500 enrolled members, occupying a reservation in central Washington containing 1.3 million acres. It is concerned that the decision in this case be consistent with the sovereignty of Indian tribes. It is therefore, deeply interested in two principles which are involved in this case: First, that the im-

munity of the tribes from suit not be considered waived unless an express waiver is found in an Act of Congress or of the tribe. Second, that if federal courts have the right to judge the propriety of tribal decisions, they do so under a rule which gives due deference to tribal decisions, where the problem facing the tribe calls for the application of Indian values and beliefs to modern problems.

The Confederated Tribes of the Colville Reservation have a deep regard for the rights of all persons coming under its jurisdiction. However, the Colville Confederated Tribes feel it important for the Court to understand the principle of tribal integrity which is at stake.

II.

SUMMARY OF ARGUMENT

A. The Indian Civil Rights Act Does Not Authorize Federal Courts to Invalidate the Substantive Laws of an Indian Tribe.

1. Governmental immunity from suit is fundamental to our law. Selective waiver of immunity by the legislature is the best public policy and the only proper way to permit suits against governments. Indian tribes are no exception to this rule. The 1975 Indian Self-Determination Act reaffirms that, as does this Court's recent decision in *Puyallup Tribe, Inc. v. Department of Game of Washington*. The Indian Civil Rights Act does not expressly waive immunity of tribes. The substantive provisions of the Act are declaratory, not remedial. The only remedy provided in the Act is habeas corpus, which is consistent with tribal immunity. Congress intended that the Act be self-executing within the framework of tribal government. It further intended that implementation would occur through a model code to be prepared by the Interior Department.

2. Federal courts have no jurisdiction over Indian tribes

under the Indian Civil Rights Act. The Act does not confer jurisdiction to hear cases brought under the Act and 28 U.S.C. §1343(4) is only a jurisdictional statute. It may be used to sustain jurisdiction only where a substantive right and cause of action are created by an act of Congress. It does not confer jurisdiction to hear cases brought under the Indian Civil Rights Act, nor does it waive immunity from suit.

B. The Equal Protection Clause of the Indian Civil Rights Act mandates deference to tribal classifications. The clause was intended by Congress only to require even-handed application of tribal laws. It was not conceived as a vehicle for imposing upon Indian tribes, changing or expanding egalitarian views drawn from Anglo-American society.

C. Indian tribes are *sui generis* and this mandates great deference to tribal as well as Congressional decision making in this area.

D. The tribal interest in governing its membership is at least as fundamental as the plaintiff's interest in claiming membership. Contemporary analytical approaches to equal protection under the United States Constitution are inappropriate to Indian tribes. Any rule should give great weight to tribal decision making. Gender distinctions are as valid as blood quantum distinctions so long as they are supported by some reason relevant to tribal values.

III.

ARGUMENT

A. The Indian Civil Rights Act Does Not Authorize Federal Courts to Invalidate the Substantive Laws of an Indian Tribe

1. *Tribal Immunity From Suit*

a. General rule

The principle that a sovereign government cannot be sued in any court without its consent or permission has

come to our jurisprudence through the common law. The immunity of the United States from suit in the federal courts was recognized from our earliest beginnings as a government. *See Chisholm v. Georgia*, 2 Dall. 419, 430, 469 (U.S. 1773); *United States v. Clarke*, 8 Pet. 436, 444 (U.S. 1834). The Eleventh Amendment, adopted in 1798, enforced comparable immunity for the states.

The doctrine permits suit only where the government grants permission, and by doing so, waives its immunity. However, because of the importance of the public interests at stake, such a waiver has been uniformly required to be clearly and expressly asserted.

While sovereign immunity has its critics, the selective waiver of immunity by governments remains the best means of insuring that the judicial branch will not be employed as a means of disrupting governmental processes, nor of tapping governmental treasuries.

Where express consent to suit has not been given, determined litigants have commonly relied on statutes dealing with the general subject matter, or general jurisdictional statutes, to support their claim of waiver, either express or implied. This Court has repeatedly struck down such efforts. *See United States v. Testan*, 424 U.S. 392 (1976) (rejecting the argument that the Tucker Act waived sovereign immunity and conferred jurisdiction on the Court of Claims to redress violation of a substantive right. *See also United States v. Sherwood*, 312 U.S. 584 (1941); *United States v. King*, 395 U.S. 1 (1969); *Soriano v. United States*, 352 U.S. 270 (1957); *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459 (1945).

b. Tribes immune from suit

The immunity of Indian tribes from suit was affirmed in 1895. The Eighth Circuit was presented with a suit brought against the Choctaw Tribe by an attorney seeking to recover his fees. The action was dismissed. *Thebo v. Choctaw Tribe*, 66 F. 372 (8th Cir. 1895). The court rejected the plaintiff's claim that a statute conferring jurisdiction in the territorial courts over suits on contracts between citizens of the United States and Indian tribes, constituted a waiver of immunity, absent an express grant of authority to bring suits against a tribe.[1] The court there found that Indian tribes occupied a position equivalent to that of the states under the Eleventh Amendment, but because of the tribes' status as domestic dependent nations, the United States could authorize suits to be brought against it. Subsequent decisions have reaffirmed the rule, in each case rejecting contentions that waiver was to be found in general jurisdictional statutes. *Turner v. United States*, 248 U.S. 354 (1919); *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908); *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940).

Congress specifically recognized and reaffirmed the doctrine of sovereign immunity in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C.A. §450, *et seq*. That Act authorized Indian tribes to contract for the performance of functions performed by the Interior Department and the Department of Health, Education and Welfare. It authorized those Departments to require tribes

1. This case and similar cases dealing with the doctrine of sovereign immunity as applied to Indian tribes are discussed in more detail in the writer's article, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D.L. Rev. 1. (1975)

to obtain liability insurance which "shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense a tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance." 25 U.S.C.A. §450f(c) and §450g(c). See also §450(n) which provides:

> Nothing in this Act shall be construed as —
>
> (1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe;
>
> • • •

This Court has within the past few weeks reaffirmed the vitality of tribal sovereign immunity in *Puyallup Tribe, Inc. v. Department of Game of Washington*, 45 L.W. 4837, (June 23, 1977), relief being denied to the State of Washington against the Puyallup Tribe upon the ground of the sovereign immunity of the Tribe from suit.

c. The Indian Civil Rights Act and sovereign immunity

The Indian Civil Rights Act of 1968 contains no express waiver of sovereign immunity of Indian tribes. Its only remedial provision is 25 U.S.C.A. §1303, conferring jurisdiction upon federal courts to grant writs of habeas corpus where there is detention by order of an Indian tribe. A writ of habeas corpus is directed to an individual responsible for the detention, and this section cannot, therefore, be read as a waiver of tribal immunity.

Yet, since the first case construing the Act, *Dodge v. Nakai*, 298 F. Supp. 17 (D. Ariz. 1968) every federal court

which has considered claims against tribes brought under the Act has ruled that the Act constitutes a waiver of tribal immunity from suit. The rationale found in all the cases is the same: unless waiver is implied, the Act would be unenforceable and thus meaningless.

But a reading of the legislative history makes it clear that Congress had in mind very limited remedies and considered the Act to be self-executing. Furthermore, it conceived that the principle means by which the Act would be implemented was a model code which would be promulgated by the Interior Department within one year from the passage of the Act. This would give those tribes not having civil rights guarantees in their tribal constitutions or tribal law and order codes, time to develop their own codes containing such guarantees or adopt the procedures necessary to conform to a Secretarial model code. Finally, where a tribe acted to the extent of detaining an individual, habeas corpus would be available in the federal courts.

The intent of the Act was succinctly stated by Senator Ervin, its principle architect:

> We have no desire to interfere with or to cut into tribal authority. We seek only to strengthen that and at the same time strengthen the rights of the American Indian, both under tribal authority and under the Constitution.[2]

The Senate Subcommittee on Constitutional Rights initially considered S. 961, a bill which would have imposed all of the restraints contained in the United States Constitution. However, when Mr. Frank J. Barry, Acting Secretary of

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2. Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 87th Cong. 1st Sess., Port 2 (1961), p. 287.

the Interior, pointed out the unworkability of this as applied to Indian tribes, the Committee was receptive.

In June, 1965, the Interior Department submitted to the Committee a substitute bill. This substitute bill specifically enumerated those provisions of the Bill of Rights which were deemed by the Interior Department to be workable in the context of Indian political life.[3]

The bill proposed by the Department contained the habeas corpus provision subsequently enacted into law. In addition, all of the substantive provisions of the Department's bill were ultimately enacted by the Congress and are now the substantive provisions of 25 U.S.C. §1302. The Committee's view was that the substantive provisions of S. 961 would be implemented in two ways: federal court intervention would be available in cases of detention under the habeas corpus clause remedy provided for. S. 964 would require the Interior Department to promulgate a model code which would incorporate substantive provisions of the Act in the criminal context only.[4] Indeed, this measure was deemed so important that it was initially proposed that a one-year moratorium be established in order to allow tribes time to adopt their own written codes, or in the alternative to accept the Department's code.[5] The one-year moratorium was, however, dropped at some point in the legislative procedure.[6]

3. Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 89th Cong. 1st Sess. (1965) (Hereinafter cited as 1965 Hearings) p. 317-318.

4. Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, *Summary Report of Hearings and Investigations: Constitutional Rights of the American Indian*, 89th Cong., 2d Sess. P. 26 (1966) (hereinafter cited as 1966 Summary Report).

5. *Id.*

6. *See* Staff of Senate Committee on the Judiciary, Subcommittee on Constitutional Rights, 89th Cong., 2d Sess., Monthly Report, (November 1966).

But it is clear that the Committee considered the provisions of Title I to be primarily self-executing. It appears from the legislative history that the Committee assumed that by the enactment of a statement of rights, now contained in §1302, Congress would establish the Bill of Rights as a part of the organic law of all of the tribes in the United States. This would remedy what the Committee considered to be one of the basic problems: the absence of civil rights provisions from many tribal constitutions. *See Burnett, An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 Harv. J. Legis. 557, 579 (1972). In its own reports the Committee frequently referred to Title I containing the enumeration of rights as in itself assuring adequate protection.[7] See *Protecting the Rights of the American Indian*, 90th Cong., 1st Sess., Report No. 841, December 6, 1967 at 6 where, in describing the purpose of Title I the report states:

> The purpose of Title I is to protect the individual Indians from arbitrary and unjust actions of tribal governments. This is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government. . . .
>
> . . .
>
> It is hoped that Title II, requiring the Secretary of the Interior to recommend a model code for all Indian tribes, will implement the effect of Title I.
>
> Accordingly, the provisions of Title I are scheduled to take effect upon the expiration of one year from the date of enactment, thus affording Indian tribes a period in which to prepare themselves for a new concept of law and order.
>
> TITLE II
>
> The purpose of Title II is to provide for a model code which will safeguard the constitutional rights of the

7. *See Senate Committee on the Judiciary, Protecting the Rights of the American Indian, S. Report No. 91-294*, 91st Cong., 1st Sess. 2 (1969).

> American Indian. The Secretary of the Interior would be directed to draft a model code of Indian offenses which would apply uniformly to all Indian courts in Indian country, thus assuring that all Indians receive equal justice under the law. It is also envisioned that the model code would incorporate those rights enumerated in TITLE I, which places certain limitations on Indian tribal governments in the exercise of self-government, particularly in the administration of justice.

Despite the awareness of the Senate Judiciary Committee of the deprivation of rights in non-criminal contexts, there is simply no suggestion in the legislative history that the Senate Subcommittee of the Congress gave any consideration to empowering federal courts to intervene in these matters. The habeas corpus provision stands in glaring isolation as the only substantive and remedial provision contained in the Act.

The legislative history indicates that Congress deliberately intended to take a first and limited step in this new and delicate area. Senator Ervin himself said to the Senate when he introduced his bill:

> . . . I wish to emphasize that these bills should not be considered as the final solution to the many serious Constitutional problems confronting the American Indian. A system of law and order for the Indian tribes of America which is in keeping with the rights and privileges other Americans enjoy will take years to develop.[8]

As the Subcommittee itself stated in reporting on the bills:

> What is now proposed is only an approximation to a perfect system. Much is necessarily left out for the present to Executive discretion, and still more to future legislation.[9]

8. 113 Cong.Rec. 13473 (1967).
9. *1966 Summary Report* at 25.

Thus, it appears that Congress intended to take a first and limited step in proposing constitutional standards on Indian tribes. By providing court review where there was detention of the person, and establishing uniform principles of individual rights which would be applicable to all the tribes, Congress made a first and unusual incursion into the internal affairs of Indian tribes. Congress was well aware that should it appear the tribal governments ignored the commandments of the Act so that additional remedies were needed, they could take such steps as were necessary to vest the federal courts with additional jurisdiction.

2. *Federal Courts Have No Jurisdiction Over Indian Tribes Under the Indian Civil Rights Act*

In this case, the court below found that the District Court had jurisdiction under 28 U.S.C. §1343(4) which provides:

> The District Courts shall have original jurisdiction of *any civil action authorized by law* to be commenced by any person: . . .
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of Civil Rights, including the right to vote.
>
> [Emphasis supplied]

This is clearly a jurisdictional statute only, which confers jurisdiction on the federal district court where an act of Congress establishes a cause of action for deprivation of civil rights and authorizes suits. It has been repeatedly held that this section is not a waiver of sovereign immunity. *Service Arms Co. v. United States Treasury Department, Alcohol, Tobacco and Firearms,* 416 F. Supp. 2 (D.C. Okla. 1975); *Henry v. Schlesinger,* 407 F. Supp. 1179 (D.C. Pa. 1976); *Peterway v. Veteran's Administration Hospital,*

495 F.2d 1223 (5th Cir. 1974); *Beale v. Blount*, 461 F.2d 1133 (5th Cir. 1972); *Corbean v. Xenia City Board of Education*, 366 F.2d 480 (6th Cir. 1966) *cert. den.*, 385 U.S. 1041; *De Kosenko v. New York*, 311 F. Supp. 126 (D.C. N.Y. 1969), *aff'd*, 427 F.2d 351 (5th Cir. 1970).

25 U.S.C.A. §1302 is not an act providing for the "*protection* of civil rights". It is declaratory of rights, not remedial. This Court recently held in *United States v. Testan, supra*, that the Tucker Act, 28 U.S.C. §1491, merely gave jurisdiction to the Court of Claims to render judgment against the United States in appropriate cases. The Tucker Act is analogous to 28 U.S.C. §1343(4). The Court found the Tucker Act did not create any substantive rights enforceable against the United States. Nor, said the Court, did it waive sovereign immunity as to measures necessary to redress violation where a substantive right was created. This Court held that where the United States is defendant, a grant of a right of action must be made with specificity.

For a fuller discussion of the improper application of jurisdictional statutes to Indian Civil Rights Act complaints, see *Ziontz, supra*, note 1, at 20-38; *see also Note, Implication of Civil Remedies Under the Indian Civil Rights Act*, 75 Mich. L. Rev. 210 (1976).

3. *Consequences of Finding Implied Waiver of Immunity*

While only one court has thus far upheld a claim for money damages against an Indian tribe under the Act, (*Loncassion v. Leekity*, 334 F. Supp. 370 (D. N.M. 1971)), given the apparently unlimited remedies deemed available under the Act by the decisions in the 8th, 9th and 10th Circuits, it is only a question of time before other courts

follow suit. It is difficult to see how any line can be drawn once courts have accepted the view that tribes have no immunity from suit under the Act. Compare the position of tribes in this respect with public officials. In *Imbler v. Pachtman*, 424 U.S. 409 (1976) the common law rule of absolute immunity of prosecutors from civil liability was held to supercede 42 U.S.C. §1983, specifically granting a cause of action for damages against public officials who conspire to deprive a citizen of civil rights.

This Court should adhere to the principles it has steadily espoused that where any sovereign immunity is to be waived, it must be done by the legislative body charged with such responsibility in a knowing and direct manner. Since Congress has previously dealt with this problem in the Indian Self-Determination and Educational Assistance Act, it can surely deal with the problem in this context.

B. The Equal Protection Clause of the Indian Civil Rights Act Mandates Deference to Tribal Classifications

1. *The Legislative History of the Clause and Congressional Intent*

The equal protection language of the Act must be read in a manner consistent with the Congressional intent. That intent was clearly to protect individual members of tribes from the tyranical or abusive conduct of tribal governments. The Congress had no assimilationist purpose in mind in this legislation, as it did in the case of earlier legislation such as Public Law 83-280. (Authorizing certain states to assume jurisdiction over Indians.)

While 25 U.S.C. §1302(8) employs the familiar phrases of the Fourteenth Amendment ("equal protection" and "due process"), its language is not, in fact, identical to the

Fourteenth Amendment, nor was its effect intended by Congress to be identical. Only a portion of §1 of the Fourteenth Amendment is included and that portion differs significantly from the language of the Fourteenth Amendment.[10]

The Fourteenth Amendment mandates that a state may not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Subsection 8, §1302 provides that no Indian tribe shall:

> . . . deny to any person with its jurisdiction the equal protection of *its* laws or deprive any person of liberty or property without due process of law.
> (Emphasis supplied)

A review of the legislative history suggests that the Subcommittee on Constitutional Rights understood that this language was tailored to fit Indian tribes and imposed only a duty of equality of treatment within classifications made by the tribe.

For instance, in explaining the Interior Department bill, which would be a substitute for S. 961, Assistant Secretary of Interior Frank Barry told the Senate Subcommittee:

> Admittedly, S. 961 would extend to Indians the rights enumerated in the First Amendment, the Fourth Amendment, the Fifth Amendment, the Sixth Amendment, the Eighth Amendment. However, it would not include rights guaranteed in the Fourteenth Amendment which applies only to states. Nowhere else in the Constitution is it required that the government give the persons within its jurisdiction equal protection of

10. The language of subsection 8 of §1302 omits two entire clauses of §1 of the Fourteenth Amendment; the citizenship clause, and the privileges and immunities clause. Sections 2, 3, 4 and 5 of the Amendment are also not included in the Act.

> its laws. I would assume that the sponsors of this legislation and the Congress, in extending civil rights to the Indians, would want to assure to individual Indians equal protection *of the laws of a tribe*.[11]
> (Emphasis supplied)

And again in the same testimony,

> Finally, we believe that the tribes should be prohibited from denying to any persons within their jurisdiction equal protection of *their laws*.[12]
> (Emphasis supplied)

As the Subcommittee stated in its Summary Report,

> The Department of Interior's bill would, in effect, impose upon the Indian governments the same restrictions applicable presently to the federal and state governments with several notable exceptions, viz, the Fifteenth Amendment, certain other procedural requirements of the Fifth, Sixth and Seventh Amendments, *and in some respects, the equal protection requirement of the Fourteenth Amendment*.[13]
> (Emphasis supplied)

2. *The Equal Protection Clause and the* Sui Generis *Status of Indian Tribes*

The Indian Civil Rights Act must be read together with the entire body of law, both statutory and case law, which recognizes Indian tribes as unique entities entitled to distinctions not permitted to any other group in the American legal system.

In *Morton v. Mancari*, 417 U.S. 535 (1974), this Court upheld the Indian Preference Act in the face of an equal protection challenge on the ground that Indians are *sui*

11. 1965 Hearings, *supra*, at 18.

12. *Id.*

13. Summary Report of Hearings and Investigations by the Subcommittee and Constitutional Rights of the Committee of the Judiciary, United States Senate, 89th Cong., 2d Sess. (1966), p. 25.

generis in the American legal system. The action of Congress in extending preferences to members of this group was found to be reasonably related to its purpose in furthering Indian self-government. The court rejected the argument that such discrimination was 'invidious racial discrimination" because of the unique political and legal status of Indian tribes.

In *Delaware Tribal Business Committee v. Weeks,* ..... U.S. ....., 97 S. Ct. 911 (1977) this Court rejected an equal protection challenge brought by an Indian group which had been excluded from participating in the distribution of a judgment fund awarded to the Delaware Tribe. In examining the basis for the Congressional decision it appeared that although there were facts supporting the Congressional decision, there were also facts which would support the plaintiff's claim for inclusion in the distribution. In making the determination in favor of the validity of the Congressional judgment, the Court gave great consideration to the fact that the authority of Congress to control tribal assets was "one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs . . ." *Id.* at 919.

The decision then concluded that the legislative judgment should, therefore, not be disturbed, ". . . as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.*

In *United States v. Antelope,* ..... U.S. ..... (45 U.S.L.W. 4361, April 19, 1977) the Court upheld the Major Crimes Act against an equal protection challenge by an Indian who had been convicted in federal court of felony murder, an offense which required a lower standard of proof than the

Idaho murder statute which would apply to a non-Indian who killed a non-Indian on the Indian reservation. The Court ruled that the Act did not violate the equal protection clause (as incorporated by the Due Process Clause of the Fifth Amendment) since the fact that state law differed was not constitutionally significant. The Court stated it would look only at whether the federal law, applicable to federal enclaves, was evenhanded in its treatment of all persons within its jurisdiction. The fact that the complainant would have received different or more advantageous treatment under a different jurisdiction was irrelevant to the analysis.

Similarly, in *Fisher v. District Court,* 424 U.S. 382 (1976), it was held that denial of access to state courts in connection with an adoption proceeding arising on a reservation was constitutionally justifiable, even though it resulted in an Indian being denied a benefit or privilege available to non-Indians, in light of the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.

Mancari, Fisher and *Antelope* all upheld classifications which imposed disabilities or extended benefits on a basis which might otherwise violate the equal protection guarantee had the cases not arisen in the context of Indian tribal affairs, a context which is *sui generis* in American law.

The *sui generis* nature of Indian tribes, when taken with the legislative history of the Indian Civil Rights Act, mandates great caution in aplying analytical techniques of the Equal Protection Clause derived from the Anglo-American context to the Indian tribal context. Any means-ends analysis here is fraught with the danger of ethnocentric value judgments. As Professor Gunther points out in his article

in the Harvard Law Review,[14] the traditional two-tier analysis involves the Court in an examination of legislative ends in terms of the "compelling interest" of the state. This unavoidably weights the "ends" with the Court's own value perceptions. Furthermore, it is inherently impossible to analyze the "suitability" or "rational" connection between the means chosen by a legislative body and its objective without employing relative values. For example, as Gunther points out, the emergence of the new equal protection analysis during the late 1960's gave rise to expectations that the clause would lead to ever-expanding judicial intervention in the interests of egalitarianism.

Recent decisions of the Court indicate increasing concern with the kinds of presumptions which follow from the applicability of the two-tier test. *Craig v. Boren*, ... U.S. ....., 45 L.W. 4057 (December 20, 1976); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

The two-tiered approach is peculiarly inappropriate to the analysis of tribal laws where the preservation of tribal values are essential. Not only does the identification of "fundamental rights" involve the imposition of the Court's values, but the applicability of the idea of "suspect" classes loses its force. The idea of "suspect" classes incorporates a value judgment. It derives from observation of the practices of the society which are in conflict with its professed ideals and principles. It may seem obvious that gender-based discrimination is "suspect" when viewing the practice in a society which is moving towards the near-total elimination of sexual distinctions, but is not nearly so obvious when viewing a traditional society such as the

14. *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

Amish, or certain Indian tribes. Their world-view may be wholly different than our own, and such discrimination may in fact be in harmony with the ideals of that society.

The great triumph of Western democracy is the establishment of the primacy of individual liberty against the power of the state. However, Indian tribes have traditionally stood in an entirely different relationship to their members than the state has to its citizens. Modern states in mass societies are faceless, impersonal and remote. Their actions present constant threats to individual freedom. Indian tribes are not comparable to mass societies. Typically, Indian communities are based on extended family principles and tribal government is a part of that system.

Under these circumstances, the Court has a duty to formulate a rule which carries out the Congressional intent underlying the Indian Civil Rights Act, bearing in mind, as Congress did, the unique social context to which it applies. If the federal government is given broad latitude in its decision making with respect to dealing with Indian tribes, should not the same latitude be given to the tribes in dealing with their members? *Morton v. Mancari*, *Delaware Tribal Business Commission v. Weeks*, *United States v. Antelope*, and *Fisher v. District Court*, all strongly suggest that the equal protection clause of the Indian Civil Rights Act should be applied to tribes in a much more deferential manner than they are applied to other branches of government. *See Note: Equal Protection Under the Indian Civil Rights Act: Martinez v. Santa Clara Pueblo*, 90 Harv. L. Rev. 627.

The rule of *Morton* and *Delaware Tribal Business Commission* could well be applicable:

> "... the legislative judgment should not be disturbed as long as the special treatment can be tied rationally to the fulfillment of (Congress's) unique obligation toward the (Indians)"

Morton v. Mancari, 417 U.S. 535, 555 (1974).

Perhaps an even better principle of adjudication of such claims might well be phrased as follows:

> A classification made by an Indian tribe will be overturned only when it clearly appears that it results in a deprivation of individual liberty guaranteed by the Indian Civil Rights Act.

This formulation would avoid most, if not all, of the difficulties arising from expanding notions of individual liberty, not grounded in any express constitutional provisions, which are developed by the Anglo-American society and its courts. It would minimize the imposition of conscious or unconscious ethnocentrism yet preserve the fundamental guarantees of liberty made by the Act. It would prohibit tribal classifications which impaired any type of activity protected by §1302(1), that is, First Amendment rights; or §1302(8), due process rights, together with all of the other rights set forth in the Act. It would carry into effect the Congressional purpose that tribal laws be applied in an even-handed manner.

It would, for example, have resulted in striking down the Navajo ordinance which discriminated against the Native American Church which was at issue in the case of *Native American Church v. Navajo Tribal Council*, 272 F.2d 113 (10th Cir. 1951), because that ordinance would have directly conflicted with the provisions of the Act which denies to an Indian tribe the power to make or enforce any law prohibiting the free exercise of religion.

It would relieve the Court of the burden of determining

over-inclusive or under-inclusive classifications in the context of Indian tribal life. That there may be other solutions to a problem which might eliminate the disability complained of is not of itself a sound basis for judicial intervention in Indian tribal government. It would also relieve the Court of the duty to inquire into the legislative history of a tribal law. This history may involve Indian values and judgments not properly understood or appreciated by Anglo-American judges. It would extend to the actions of Indian tribes appropriate deference. That deference is mandated if the Indian Civil Rights Act is not to become an engine of destruction of Indian uniqueness. No matter how the Court may view the desirability or undesirability of that uniqueness, the Act was not designed to further Indian assimilation.

C. The Tribal Interest Here Manifestly Justifies Its Classification

Intermarriage creates problems for all homogeneous cultural or ethnic groups. Acute strains are created when membership means entitlement to a share in a limited resource, such as land. How the group resolves this problem will necessarily reflect its basic values. Any solution which excludes the children of some members will be harsh—imposing penalties on sons or daughters who choose to intermarry, as well as their children.

While a group may choose to exclude all of the offspring of marriages with outsiders, it is not uncommon for the choice to be based on patrilineal or matrilineal lines. For example, under Orthodox Jewish law, the status of a child born of intermarriage is designated as following that of the

mother.[15] Such choices may be based on what the group feels to be important pragmatic or religious considerations.

Where a group is patrilineal or patrilocal, such as the Santa Clarans, the choice may well reflect the view that a woman member of the Pueblo who marries outside of the Pueblo is more likely to leave it than a male member. This would merely be reflective of the contemporary fact that women do generally take up residence in the community of their husbands. This would appear to be borne out by the facts found by the trial court that sixty percent of the non-residents of the Pueblo were women. While it may also reflect the fact that to some extent perhaps, these women left the Pueblo because of the disabilities which their children would sustain by not being members, the record does not clearly demonstrate this. It is equally possible to hypothesize that they left because they married into cultures with a patrilocal tradition, or that they have followed their husbands to places of employment outside the Pueblo. In any case, it cannot be said that the patrilocal tradition of the Santa Clara Pueblo was irrelevant to their decision to exclude the offspring of females who marry outside of Pueblo.

Is an Indian tribe which excludes the offspring of one sex which marries outside the tribe to be precluded from making such a decision by the equal protection language of the Indian Civil Rights Act?

It is submitted that no such prohibition should be arbitrarily imposed against any tribe. Employing the test proposed here would not mandate such a result. In other words, where the classification does not interfere with the

15. Encyclopaedia Judaica (1971 Ed.) Vol. 10 at 23.

specific guarantees of §1302(1) or any of the other subsections, the tribal classification must stand. If the Court were to employ the rational basis test, the Pueblos ordinance would clearly stand. The two-tiered test is peculiarly inappropriate here since the Pueblos' interest in its membership is at least as fundamental as the plaintiff's interest. There is simply no escaping the problem of balancing these respective interests.

To denigrate the Tribe's decision on the grounds that it is of recent vintage, or that it is based on economic or pragmatic considerations is to ignore the significance of the Tribe's decision in light of its culture.

The record here indicates that the Pueblos' decision to limit membership came as a product of a crisis in its history. The Pueblo underwent severe internal strife resulting from the contact with Anglo-American society over a period of many years, which was apparently resolved by the adoption of its present Constitution and By-Laws in 1935. *See Martinez*, 402 F.Supp. 5, at 13. The Council exercised its constitutional authority to determine which children of mixed marriages shall be recognized as members by enacting the present ordinance in 1939. That ordinance has been in effect for over 35 years. The record also shows that since 1963 plaintiff Julia Martinez has attempted to persuade the Pueblo and its government to change this ordinance. She and other women similarly situated formed a committee which petitioned the Council and which succeeded in having a special meeting of the entire Pueblo convened to discuss the situation. 402 F. Supp. 11. She was apparently unsuccessful.

The ordinance stands, therefore, as the collective judgment of the members of the Pueblo that the ordinance em-

bodies the appropriate principle of classification.

That the decision relates to economic interests does not detract from its interrelation with the life of the Pueblo. Indeed, it only serves to emphasize the issue as one which goes to the very survival of this Community.

The interrelationship of land and economy to the culture of the Pueblo Indians is authoritatively discussed in *The Pueblo Indians of New Mexico, Their Land, Economy and Civil Organization*, by S. D. Aberle.[16] Mrs. Aberle was General Superintendent, United Pueblos Agency, United States Department of Interior from 1934 to 1943. She also was a Ph.D and M.D. As Aberle says:

> A culture is composed of innumerable interlacing parts which depend for their cohesion upon forces both within and without the group.
>
> • • •
>
> Land in the eyes of the Indian is his most precious possession.

Aberle concludes as follows:

> However, the manner in which the more modern Pueblos have adapted their civil forms to changing conditions, the ability of all of the Pueblos to adopt laws which they consider important, their ability to resist changes which they do not believe to be for the good of the Tribe, their ability to handle judicial, legislative and executive functions—all these lead to the conclusion that the civil organizations are not only units adapted to their own life and culture, but that throughout they have maintained their vitality. . . . Insofar as the federal government limits its authority to handling Indian problems which lie outside of the local tribal authority, and refrains itself from entering into decisions which should be under the jurisdiction of Pueblo officials, just so long will the Pueblo organizations continue to function effectively.

16. 50 American Anthropologist No. 4, Part 2, Memoir No. 70.

IV

CONCLUSION

Where devolution of land follows membership, it is crucial for the Pueblo to be able to control membership by principles integral to the values of the Community. Any classification system may well produce anomalous results. Even blood quantum requirements may result in gross disparities in otherwise equal circumstances. It should be remembered that there is nothing culturally sacred about blood quantum. This indeed appears to be a criteria imposed by the Anglo-American society, one which it finds convenient because of its relative mathematical certainty. Nevertheless, blood quantum requirements also reflect a cultural bias by our society. While the Martinez children present the Court with a "hard case", the Court should reject the invitation to substitute its wisdom for the wisdom of the Santa Clara Pueblo.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-682

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BRIEF OF THE SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER INDIAN RESERVATION, AND THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICI CURIAE*

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Congressional Materials, continued: Page

Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate: Constitutional Rights of the American Indian, 87th Cong., 1st sess., Pts. 1 and 2 (1961) 7

Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Constitutional Rights of the American Indian, 87th Cong., 2d Sess., pt. 3 (1962) 8

Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate: Constitutional Rights of the American Indian, 88th Cong., 1st Sess., pt. 4 (1963) 8

Hearings on S. 961, S. 962, S. 963, S. 964, S. 966, S. 967, S. 968, S.J. Res. 40, to Protect the Constitutional Rights of American Indians, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st sess. (1965) 8, 9

Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Summary Report of Hearings and Investigations (1966) 9

Miscellaneous:

Cohen, Felix S., Handbook of Federal Indian Law, pp. 133-137 (GPO 1942) 14

Price, Monroe E., Law and The American Indians, Readings, Notes and Cases, pp. 748-749 (1973) 11

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INTEREST OF *AMICI*

This brief is submitted with the written consent of all parties to the case, lodged with the Clerk. See Rule 42(2) of the Rules of this Court. *Amici*, two major Indian tribes and the principal national organization of Indian tribes, are interested in this case to protect themselves and their members from any expansion of the liability of Indian tribes to suit without their consent, not specifically provided by Congress, and to protect the authority of Indian tribes over their own membership standards.

QUESTIONS PRESENTED

1. Whether Congress by enactment of the Indian Civil Rights Act of 1968 (25 U.S.C. 1301-1303) waived the immunity of Indian tribes and their officers from suits, other than by writ of habeas corpus?
2. Whether under the Indian Civil Rights Act, Federal courts may alter tribal membership standards?
3. Whether the particular membership ordinance at issue here is violative of the equal protection standard of the Act?

STATEMENT

A 1939 enrollment ordinance of the Santa Clara Pueblo grants membership to "children born of marriages between male members of the Santa Clara Pueblo and non-members . . . ." and precludes membership for "[c]hildren born between female members of the Santa Clara Pueblo and non-members. . . ." 540 F.2d 1039 at 1040. The ordinance was enacted "in response to a marked increase in marriages between Pueblo members and non-members" which "had been rare" before 1939. (*Ibid.*) The court of appeals found that:

> "The increase in mixed marriages produced concern about the enlarged demands for allocation of land and other tribal resources. The Pueblo's elders were apprehensive that the population increase resulting from intermarriage would strain the Pueblo's finite resources." (*Ibid.*)

The Santa Clara Pueblo is traditionally a patrilineal and patrilocal society. (*Id.* at 1041; 402 F. Supp. at 16).

The Indian Civil Rights Act of 1968, 25 U.S.C. 1302, provides that:

> No Indian tribe in exercising powers of self-government shall –
>
> * * *
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; * * *

In a suit brought against the Pueblo (tribe) and its governor, the court of appeals held that the Pueblo ordinance was invalid because it contravenes the equal protection clause of the Act (540 F.2d *supra* at 1048).

The Act contains only the following judicial review provision:

> "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe" (25 U.S.C. 1303.)

The court below concluded that the Act implicitly waived tribal immunity from suit (540 F.2d *supra* at 1042) and empowered Federal courts to review tribal membership standards (540 F.2d *supra* at 1047-1048).

ARGUMENT

I.

THE PUEBLO AND ITS GOVERNOR ACTING IN HIS OFFICIAL CAPACITY ARE IMMUNE FROM SUIT EXCEPT TO THE EXTENT THAT THEY MAY BE DEFENDANTS IN A PROCEEDING FOR A WRIT OF HABEAS CORPUS.

The principle that Indian tribes, and their councils or executive officers acting within their lawful authority, are immune from suit derives from the status of Indian tribes as governmental entities. Indian tribes are treated in the United States Constitution *in pari materiae* with states and foreign nations. Art. I, Sec. 8, cl. 3. This Court while recognizing Congress' plenary authority over Indian Tribes and trust responsibility toward them, has also continuously recognized the tribes' residual sovereignty, *e.g.*, *Worcester v. Georgia*, 6 Pet. 515 (1832); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-173 (1973); *United States v. Mazurie*, 419 U.S. 544 (1975), and their immunity from suit, *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Puyallup Tribe, Inc. v. Department of Game of Washington*, decided June 23, 1977, Slip Op. at 6.

Immunity from suit is important to tribal existence and to the perpetuation of Indian culture. Immunity is far more significant for a tribe than for a State or the Federal Government because of the tribes' more limited resources. Tribes lack a substantial tax base. Nor can they print money. As a court of appeals long ago recognized:

> "As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if

> it was subject to the jurisdiction of the courts and required to respond to all the demands which private parties chose to prefer against it." *Thebo v. Choctaw Tribe of Indians*, 66 Fed. 372, 376 (C.A. 8, 1895)

For this reason, the court in *Thebo* held that a waiver of immunity of an Indian tribe must be in "plain and unambiguous terms."

Amici do not dispute the plenary power of Congress to alter the traditional rules, however well established, of tribal immunity from suit and tribal control over membership. Congress *could* open tribal treasuries to damage actions, subject tribal officers to federal court injunctions, authorize federal courts to set aside tribal membership standards or even provide its own membership criteria. But this Court has consistently held that Congress must clearly indicate an intention to modify or abrogate long established Indian rights for those rights to be modified. *Rosebud Sioux Tribe v. Kneip*, decided April 4, 1977, Slip Op. 2-3; *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Squire v. Capoeman*, 351 U.S. 1, 7 (1956).

Nothing in the language of the Indian Civil Rights Act alters a tribe's immunity from suit of its officers, except in habeas corpus proceedings. Nothing in the

legislative history of the Act suggests such a Congressional intent. Indeed, both the language and history of the Act indicate that Congress considered and rejected more expansive Federal judicial review of the actions of tribes. Nor does the purpose of the Act require the result reached by the lower court. *Amici* accordingly submit that – until and unless Congress clearly speaks – tribal immunity from suit, except by habeas corpus, and tribal control over membership standards, should remain unimpaired.

A. Congress Provided a Specific Remedy – Habeas Corpus – and Considered, Then Rejected, More Extensive Remedial Provisions for Violations of the 1968 Act.

Unlike the civil rights statute considered in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (42 U.S.C. 1982) or the constitutional provisions at issue in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Indian Civil Rights Act provides a specific and single Federal judicial remedy for violations of its terms. Section 1303 of Title 25, U.S.C. provides:

> "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

The presence of this single, specific, remedy indicates that Federal judicial review was provided only where a tribe has deprived a person of liberty.

This conclusion –while at variance with decisions by lower courts[1] – is fortified by the legislative history of

[1]This Court has not considered whether the traditional immunity of tribes from suit was waived by the 1968 Act. Most decisions of courts of appeal in abstract situations before trial on

[footnote continued]

the 1968 Act. After several hearings in two earlier Congresses,[2] Senator Ervin introduced a number of separate bills in 1965 that ultimately became the basis for the 1968 Indian Rights Act. The substantive

the merits have held that federal courts have jurisdiction over alleged tribal violations of the Indian Civil Rights Act regardless of whether habeas corpus was sought. E.g., *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 932-934 (C.A. 10 1975); *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200, 202-203 (C.A. 9, 1973); *Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698, 700 (C.A. 8, 1972); But see *Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079 (C.A. 8, 1975); *Slattery v. Arapahoe Tribal Council*, 453 F.2d 278 (C.A. 10, 1971). This conclusion has been reached usually in reliance on 28 U.S.C. 1343 (4) and cases such as *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388.

28 U.S.C. 1343 reads:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

This statute, standing alone, does not waive sovereign immunity, *Corbean v. Xenia City Board of Education*, 366 F.2d 480 (C.A. 6, 1966), and the limited grant of jurisdiction in 25 U.S.C. 1303 is inconsistent with a waiver of sovereign immunity.

Most commentators on the Act have been critical of the lower courts' broad jurisdictional rulings. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S. Dak. L.Rev. 1 (1975); Lazarus, *Title II of the 1968 Civil Rights Act*, 45 N. Dak. L.Rev. 337 (1969); see also Price, quoted at p. 11 *infra*.

[2]Hearings were held in 1961, 1962 and 1963 before the Senate Judiciary Subcommittee on Constitutional Rights. Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate: Constitutional Rights of the American Indian, 87th Cong., 1st sess., Pts.1 and 2

[footnote continued]

guarantees that became 25 U.S.C. 1302 were included in S. 961.[3] Importantly, S. 962 authorized appeals of *all* tribal court criminal convictions to federal district courts with the right of trial de novo. And S. 963 empowered the Attorney General to investigate complaints of denial of constitutional rights of Indians by tribes and to bring appropriate criminal *or civil* actions to vindicate the rights denied.

These last two bills *did not pass.* They were opposed by the Interior Department, *inter alia* on the grounds that they would unnecessarily burden the federal court system.[4] The present habeas corpus provision of

(1961); Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Constitutional Rights of the American Indian, 87th Cong., 2d sess., pt. 3 (1962); Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary. United States Senate: Constitutional Rights of the American Indian, 88th Cong., 1st Sess., pt 4 (1963).

[3]As originally introduced, S. 961 did not enumerate guarantees but simply provided:

> That any Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution. (111 Cong. Rec. 1799 (1965))

It was modified and reported out in its present form by the Subcommittee as a new bill, S. 1843, 90th Cong., 1st sess. (1967)

[4]Hearings on S. 961, S. 962, S. 963, S. 964, S. 966, S. 967, S. 968, S.J. Res. 40, to Protect the Constitutional Rights of American Indians, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., at 19, 23 (1965) [hereinafter cited as 1965 Hearings] (Testimony of Frank Barry, Solicitor of the Department of the Interior).

[footnote continued]

Section 1303 was added to the bill as a replacement for them, again at the Interior Department's recommendation.[5] The modified bill was reported out of committee, and passed the Senate in 1967.[6] Afterwards, the Senate added the entire bill as an amendment to the House-passed civil rights bill, and the House accepted the amendment.[7]

The *only* consideration Congress gave to opening the Tribes to civil suits was rejection of the provision that would have permitted the Attorney General to bring such suits. Similarly, full federal judicial review of criminal convictions was considered and also rejected. As passed, the Act limits judicial review of tribal actions to habeas corpus proceedings. This represents a balancing by Congress of many factors after years of hearings: protection of individual's constitutional rights, the burden on the federal judiciary of review of tribal actions, the desire to limit interference with tribal court systems and exercise of tribal governmental functions, and the traditional immunity of tribal governments from suit.

Apparently, the Subcommittee was initially inclined to press ahead with S. 962. Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Summary Report of Hearings and Investigations: Constitutional Rights of the American Indian, 89th Cong., 2d Sess., 26 (1966). (hereafter cited as 1966 Senate Report.) No vestige of this bill, however, was contained in S. 1843 when passed in 1967.

As originally introduced, S. 1843 did contain a limited provision for federal judicial review of *criminal* convictions by tribal courts where a denial of constitutional rights was involved.

[5]1965 Hearings at 24 (Barry testimony), 318.

[6]S. Rep. No. 841, 90th Cong., 1st sess. (1967); 113 Cong. Rec. 13474-13475 (1967).

[7]114 Cong. Rec. 5992, 9621 (1968).

B. Expansion of Federal Judicial Review is Not Necessary to Achieve the Purposes of the Act.

Expansion of federal judicial review beyond what Congress set forth is not necessary to achieve the purposes of the 1968 Act. Some lower courts have suggested that – if judicial review were limited to habeas corpus – the provisions of the Act that do not relate to criminal detention would become "unenforceable," and "almost meaningless."[8] The opposite is true. The Act would remain enforceable in tribal courts where tribal actions were challenged.[9] Moreover, the Secretary of the Interior has extensive powers of review and approval of tribal ordinances, and would be obligated to disapprove ordinances inconsistent with the Act. See, e.g., 25 U.S.C. 476, 18 U.S.C. 1161.

The 1968 Act is not a single purpose statute, but has "twin, and possibly conflicting goals": greater protection of "individual rights of Indians, while fostering tribal self government and cultural identity." *Wounded Head v.*

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[8] E.g., *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200, 203 (C.A. 9, 1973); *Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698 (C.A. 8, 1972). See also the decision below, *Martinez v. Santa Clara Pueblo*, 540 F.2d *supra*, 1048.

[9] The importance of tribal courts as legal institutions has often been recognized by this Court. See e.g., *Fisher v. District Court*, 424 U.S. 382, 386-389 (1976); *Williams v. Lee*, 358 U.S. 217, 220, 222 (1958). Congress in the 1968 Act, also directed the Secretary of the Interior to prepare a model code "to govern the administration of justice by courts of Indian offenses on Indian reservations." 25 U.S.C. 1311.

Tribal Council of Oglala Sioux Tribe, 507 F.2d, *supra*, at 1082. Congress clearly did not intend absolute federal protection of individual rights, at whatever cost to tribal culture and government.

The decision below, and similar lower court holdings, upset the balance arrived at by Congress, greatly enlarging federal court jurisdiction and interfering with tribal governmental processes. As the leading contemporary scholar of federal Indian law has written in reviewing decisions of the courts of appeals permitting federal judicial review of tribal actions:

> "The widespread consensus that there is subject matter jurisdiction is surprising in view of the sparseness of the statutory language and the absence of legislative history supporting jurisdiction. . . . The haste to find general federal subject matter jurisdiction arises out of the rather facile adoption of constitutional reasoning in the analysis of Civil Rights Act matters." Price, Monroe E., *Law and The American Indian: Readings, Notes and Cases*, pp. 748-749 (1973).

If the 1968 Act should prove insufficient to protect individual rights, Congress could address the question anew and decide whether Indian tribes should be subjected to the full burden of federal court litigation and potential damage awards.

II.

IF THE INDIAN CIVIL RIGHTS ACT PROVIDES FEDERAL JUDICIAL REVIEW OTHER THAN BY HABEAS CORPUS, SUCH REVIEW SHOULD BE LIMITED TO INJUNCTIVE RELIEF AGAINST TRIBAL OFFICERS.

If this Court holds that the Indian Civil Rights Act did implicitly waive tribal immunity to some degree, the waiver should be limited to tribal officers – not the Tribe itself. The distinction between permitting injunctive relief against a sovereign (through its officers) and permitting a judgment (often a money judgment) against the sovereign itself has been well established by this Court in *Ex parte Young*, 209 U.S. 123 (1908) and *Edelman v. Jordan*, 415 U.S. 651 (1974). These cases involve an interpretation of the Eleventh Amendment, but in a more fundamental way they concern the need to protect the treasury of a government while permitting injunctive relief to assure protection of civil rights. In *Ex parte Young*, the Supreme Court held that the Eleventh Amendment (which prohibits suits against the states in federal courts, except by the United States) does not bar an injunctive action against a state official. *Edelman* limited Young by adding that if the effect of the inunction is to require a payment from the treasury of the state itself, the claim is barred even though brought only against the official (415 U.S. at 673-674).[10]

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[10] Admittedly, the Eleventh Amendment is not literally applicable to a suit against an Indian tribe, but the principle that an Indian tribe's sovereign immunity can only be waived to the extent expressly provided by Congress serves the same purpose. E.g., *Thebo v. Choctaw Tribe of Indians*, 66 Fed. (supra) at 375-376.

Lower federal courts, by failing to adhere to the distinction between a tribe and its officials, have literally threatened tribes with bankruptcy and extinction.[11] In a recent case, for example, the Shoshone and Arapahoe Tribes were sued by private parties for some 24 million dollars as a result of a resolution by the tribal councils seeking federal assistance to prevent the plaintiffs from using a private road across tribal members' property without the members' consent. Jurisdiction was alleged and recognized by the Court of Appeals for the Tenth Circuit under the equal protection and due process clauses of the Indian Civil Rights Act. The United States District Court for the District of Wyoming on remand sustained a jury verdict for $500,000 against the Tribes. *Dry Creek Lodge v. Canan*, C74-74A. This award exceeds the annual income of most federally recognized Indian Tribes.

Although the respondents in this case have not sought money damages against the Pueblo, a holding by this Court that tribal immunity from suit has been waived by the Indian Civil Rights Act will encourage actions against tribes for money judgments, forcing relatively impoverished Tribes to divert limited funds from needed services to members to payment of attorneys' fees and judgments. Indian tribes, if left unprotected, are an open target for such suits. Federal trust responsibility for Indian funds is defeated by such actions. The policy of tribal immunity has heretofore protected Indian tribes from this result, and that

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[11] Most Indian Civil Rights Act decisions by courts of appeal have indiscriminately allowed relief against both the tribe and its officers, e.g., *Johnson v. Lower Elwha Tribal Community*, *supra*; *Brown v. United States*, 486 F.2d 658 (C.A. 8, 1973).

immunity should not be breached absent a very clear indication — lacking here — that Congress intends such a result.

III.

FEDERAL COURTS SHOULD NOT INTERFERE WITH TRIBAL MEMBERSHIP STANDARDS.

Even if this Court should hold that all aspects of tribal immunity from suit were dissolved by the 1968 Act, it should not interject the Federal judiciary into the internal tribal affair of setting membership criteria.

Since the Martinez children satisfy all other criteria for membership, the practical effect of the court of appeals decision is to direct the Pueblo to enroll them. This holding reverses two hundred years of Federal Court abstention in this delicate area of tribal membership standards, confirmed on at least three occasions by this Court. *Cherokee Inter-Marriage Cases*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897); *Nofire v. United States*, 164 U.S. 657 (1897). See generally, *Cohen, Felix S. Handbook of Federal Indian Law*, pp. 133-137 (GPO 1942).

If the Federal courts are to review tribal membership determinations at all, this review should be limited to ensuring a non-discriminatory or "even-handed" application of tribal legislation. This has, in fact, been the approach of some lower courts which have reviewed membership and related determinations on the merits under the Indian Civil Rights Act. E.g., *Yellow Bird v. Oglala Sioux Tribe*, 380 F. Supp. 438 (D. S. Dak. 1973); *Daly v. United States*, 483 F.2d 700, 705, 706 (C.A. 8, 1973); see also *Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d, *supra*, at 1083; *Groundhog v. Keeler*, 442 F.2d 674 (C.A. 10, 1971).

Tribal membership, being akin to citizenship, is essentially a political determination subject to majoritarian control by the Tribes themselves. The nature of this determination counsels that it be left to the tribes (subject, of course, to the plenary power of Congress), or to the federal agencies expert in Indian affairs. Federal courts should not substantively intrude in as basic a matter of tribal culture and policy as the setting of membership standards.

IV.

THE PUEBLO ORDINANCE, IN ANY EVENT, SATISFIES THE 1968 ACT'S EQUAL PROTECTION PROVISION.

Lower courts seem generally in agreement that the equal protection clause of the 1968 Act should be applied differently from the Constitutional standard, and that tribal actions should be sustained where justified in terms of the tribal interest in maintaining a separate and unique Indian polity and society. [12]

While giving lip service to this principle, 540 F.2d, *supra* at 1047, the court of appeals invalidated the Pueblo ordinance because the Pueblo had not shown a "compelling" interest to support it. That is not the proper test as to distinctions based on gender even outside the Indian area.[13]

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[12] E.g., *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233, 238 (C.A. 9, 1976); *Means v. Wilson*, 522 F.2d 833, 842 (C.A. 8, 1975); *Wounded Head v. Oglala Sioux Tribal Council, supra*, 507 F.2d, *supra*, at 1083.

[13] *Schlesinger v. Ballard*, 419 U.S. 498, 505-510 (1975); *Geduldig v. Aiello*, 417 U.S. 484, 494-498 (1974); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Reed v. Reed*, 404 U.S. 71 (1971).

Whether "compelling" or not the ordinance clearly has a rational basis. The Pueblo has limited lands and assets. Its people are poor. Just as this Nation limits its immigration, the Pueblo must limit its expansion of membership by intermarriage. No limitation will be entirely satisfactory but some must be made. The limitation at issue here is rational within the patrilineal system of the Tribe.

The court of appeals rejected the ordinance as "arbitrary and expedient" because it "originates from practical economic considerations." 540 F.2d, *supra*, at 1048. Just such considerations should sustain the ordinance. The Court of Appeals' reasoning would deny tribal government the authority to consider economic consequences in fashioning policy.

Similarly, the 38-year old ordinance was invalidated in part because it is "of relatively recent origin and so it does not merit the force that would be attributed to a venerable tradition." *Ibid.* Tribes, like other governments, must have the power to adapt policy to changing circumstances.

The decision of the court of appeals – because of its lack of familiarity with tribal institutions and Indian affairs – is premised on a near-complete derogation of tribal governmental powers and processes. The court's process of analysis reflects the wisdom of leaving the balancing of governmental choices by Indian tribes to the tribes themselves rather than federal courts.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-682

SANTA CLARA PUEBLO, *et al., Petitioners,*

v.

JULIA MARTINEZ, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Hearing on Title II of the Civil Rights Act of 1968 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969) 11, 19

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Treatises, Texts, and Articles:

F. Cohen, Handbook of Federal Indian Law (U.N. Mex. 1971) 14, 25

E. Dozier, The Pueblo Indians of North America (N.Y. 1970) 17

F. Hodge, Handbook of North American Indians (Smithsonian Bur. of Amer. Ethnology, Bull. 30, 1910) 16

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A. Ortiz, The Tewa World: Space, Time, Being, and Becoming a Pueblo Society (Chi. 1969) 23

J. Swanton, The Indian Tribes of North America (Smithsonian Bur. of Amer. Ethnology, Bull. 145, 1952) 16

1 Moore's Federal Practice (2d ed. 1976) 4, 12

Burnett, Jr., *An Historical Analysis of the 1968 Indian Civil Rights Act,* 9 Harv. J.Leg. 557 (1972) 28

Ellis, *The Pueblo Social Organization as Basis for Rules of Tribal Membership, printed in,* Br. of The Pueblo De Cochiti, *et al.,* in Support of Pet. for Cert., App. K 16

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SANTA CLARA PUEBLO, *et al., Petitioners,*

v.

JULIA MARTINEZ, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

CONSENT TO FILING OF BRIEF AMICUS CURIAE

Petitioners and Respondents have consented in writing to the filing of this brief. Copies of such consents have been filed with the Clerk.

INTEREST OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE

The National Tribal Chairmen's Association (NTCA) is a voluntary, non-profit organization com-

posed of the chief officers of reservation Indians or federally recognized Indian tribes with federal trust lands or with members who live on or near federal reservations having a local governing entity. Approximately 190 federally recognized tribes having a population of around 90 percent of the approximately 800,000 American Indians are represented in NTCA.

The purpose of NTCA, as an official voice of American Indian leaders, is to encourage the preservation of Indian cultures and to promote economic, political, and social progress among Indian people. NTCA endeavors to ensure that the historic trust relationship between the United States and reservation Indians is not impaired or terminated and to protect the human and natural resources of Indian reservations and of federally recognized tribes.

The Tenth Circuit has held that the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03 (1970), authorizes federal judges to decide how sovereign Indian tribes should determine who is eligible for tribal citizenship. As spokesman for the reservation-based and federally recognized Indian tribes of this country, NTCA must challenge such a disastrous inroad into tribal sovereignty.

NTCA has a vital interest in preserving the right of federally recognized, quasi-sovereign tribes to select their own memberships and to preserve their social and religious structures, disparate though they be from Anglo-American structures. The tribes have developed differing requirements for citizenship because of different cultural, economic, and geographic backgrounds.

The issue here, whether, in a tribe that prohibits all adoptions, children of a "mixed" marriage in which

the father is an alien must be accorded tribal membership because children of a "mixed" marriage in which the father is a tribal member are accorded membership, rests on a striking facet of Santa Claran tradition predating the Spanish conquest.[1] Under the guidance of elders, the father, not the mother, is charged with the non-delegable duty of teaching his children the Pueblo's history and tradition and of instructing the child in its religion and in its ceremonial rites. This crucial duty, performance of which is essential for the Pueblo's cultural survival, cannot, or so the Pueblo believes, be performed by a father reared in an alien atmosphere nor by the mother acting as surrogate father.

NTCA's interest is to ensure that all tribes retain the power to define their own society, to determine their own membership and identity, for if a tribe's "ability to do this is limited or restricted by an external authority, then a new definition of what it is to be a Santa Claran is imposed, and the culture of Santa Clara is inevitably changed." Op. of District Court in this case, 402 F. Supp. 5, 15.

Petitioners have and will emphasize the particular facts associated with this litigation. NTCA, however, as a collective voice of Indian leadership, stands in position to present the Court with the broad ramifications inherent in the decision to be reached. All Indian tribes, all Indian people, will be touched.

The Tenth Circuit decision, both on jurisdiction and on the merits, opens the door to constant, debilitating

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[1] The Santa Clara reservation has been at its present location, approximately 25 miles north of Santa Fe, New Mexico, for at least 300 years. Pet. for Cert., at 7.

federal litigation that will exhaust the tribes financially and, if permitted to stand, will open tribal legislative decisions, made for societies unlike the Anglo-American, to United States judicial supervision under United States standards. This would make dual citizenship a sham and would undo much of the good accomplished by the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79 (1970), designed to give federally recognized tribes considerable self-government.

SUMMARY OF ARGUMENT

Jurisdiction of this declaratory judgment-injunction action was contested below on the theory that the complaint failed to state a cause of action. We suggest that the courts below, and this Court, lack jurisdiction because the Indian Civil Rights Act provided that the only means for its judicial enforcement would be by habeas corpus. This contention, although not argued below, is open here. *Liberty Mutual Ins. Co. v. Wetzill,* 424 U.S. 737, 740 (1976).

The courts below implied jurisdiction on the theory that if habeas corpus was the only legal remedy, then portions of the law were not judicially enforceable, a result they believed Congress did not intend. However, that conclusion is untenable because in all other civil rights acts Congress has created sweeping, specific remedies. Where a statute creates a right and provides a specific remedy (habeas corpus in this case), that remedy is exclusive. Federal district courts have only such jurisdiction as Congress, rightly or wrongly, confers on them. *Palmore v. United States,* 411 U.S. 389, 395-96 (1973); *Cary v. Curtis,* 44 U.S. (3 How.) 236, 246 (1845); 1 Moore's Federal Practice ¶ 0.60[2], [3]

(2d ed. 1976). *See Califano v. Sanders,* 97 S.Ct. 980 (1977).

Going to the merits:

Shining through the Tenth Circuit opinion is an abhorrence of any gender-connected discrimination. Because the United States, commencing with the nineteenth amendment in 1920, has engaged in a steady program of obliterating distinctions between the sexes, the court tested the Indian statute at bar in the light of that Anglo philosophy which is wholly alien to many Indian philosophies, Santa Claran philosophy included.

Moreover, the court engaged, improperly we suggest, in independent fact-finding. Where the district court had found factually that the Santa Claran society was patrilineal and patrilocal, the court of appeals swept such findings aside as "conclusory characterizations." 540 F.2d at 1047. The fact is, those "characterizations," while stated in terms of art, are based upon solid, uncontradicted evidence. (See attached Appendix).

The court of appeals oversimplified and misstated the issue by stating the disputed ordinance drew "its classification lines on the basis of sex," whereas, in fact, deeper cultural interests were at stake; gender, per se, was not the origin of the ordinance. The distinction and classification is one between progeny of a native Santa Claran father and progeny of a father who is an alien to the Pueblo.

In 1939, the Santa Clara Pueblo faced a serious problem. Because of an increase in "mixed" marriages, more and more cultural outsiders lived within the

Pueblo community. Before the 1930's, "mixed" marriages were rare. When a Santa Claran woman had married a non-Santa Claran, the family was expected to, and usually did, live in the husband's community; the children would not become citizens of the Pueblo. This rule was not inflexible, however, and in the exceptional instances where a non-Santa Claran male desired his family to reside in the Pueblo, such residence was allowed. Further, if the alien proved himself worthy in the traditional way, it was possible for him and his children to become naturalized citizens of the Pueblo. Such a decision was reached on an ad hoc basis, but the Santa Clarans had a history of jealously guarding their identity.

In 1935, the Pueblo adopted its Constitution and Bylaws and set out to solve the problem of naturalization. In 1939, it passed its membership ordinance, under which there have been no naturalizations, male or female. This ordinance also dealt with the sensitive problem of mixed marriages.

The ordinance denies membership to children of women who marry aliens, but extends membership to children of men who do so. The key teaching of the Pueblo's traditions and way is the responsibility of the father. The mother's role in teaching the children "how to be Santa Clarans" is minimal. Thus, the ordinance is logical: If the father is Santa Claran, he can inculcate Santa Clara tradition; but if the father is a cultural outsider, he probably will not understand the Pueblo and will teach his children an alien way. The cultural impact of a non-Santa Claran mother on the tribe is minimal; the cultural impact of a non-Santa Claran father can be devastating.

The Tenth Circuit assumed the power to sit in judgment over Pueblo tradition and custom. It is the only court to have done so. The court held, in effect, that Pueblo culture manifested in the ordinance was not "compelling," thereby placing a higher burden of showing the validity of Indian legislation than is imposed on states or on the federal government.

Membership ordinances are the principal way in which Indian tribes define themselves as distinct communities within the American system. Since the Indian Reorganization Act, Congress has respected and encouraged the rights of Indian tribes to exist freely as self-governing peoples. *Morton v. Mancari,* 417 U.S. 535, 542, 553 (1974). The relationship between the federal government and tribal governments is a delicate, fragile one. The judiciary should not intervene to make federal Indian policy without clear warrant from Congress.

ARGUMENT

I. FEDERAL COURTS HAVE NO JURISDICTION TO ENTERTAIN PRIVATE. CIVIL CAUSES OF ACTION BROUGHT BY INDIVIDUALS AGAINST INDIAN TRIBES ALLEGING A VIOLATION OF THE INDIAN CIVIL RIGHTS ACT.

Jurisdiction was pleaded under both the Indian Civil Rights Act, 25 U.S.C. § 1302(8) (1970), and the Civil Rights Act of 1948, as amended, 28 U.S.C. § 1343 (1970). The latter statute appears not to have been relied on by either the district court or by the Tenth Circuit and begs the question because it provides only that:

> The district courts shall have original jurisdiction of any civil action *authorized by law to be commenced by any person. . . .* 28 U.S.C. § 1343 (1970) (emphasis added).

The Tenth Circuit assumed the power to sit in judgment over the tradition and culture of the Santa Clara Pueblo. However, by section 1302 Congress only granted federal courts the power to hear petitions for a writ of habeas corpus. Nevertheless the court felt it had authority to settle any complaint alleging a violation by an Indian tribe of the Indian Civil Rights Act.

Precedents over the last two centuries that limit federal jurisdiction to matters clearly delineated by Congress and that recognize the sovereign immunity of Indian tribes from suit were ignored. There is no statutory language that even remotely encourages this result.

The Act and the legislative background demonstrate that Congress intended a limited enforcement role for federal courts under the Act and that Congress at no time intended to require Indian tribes to defend their diverse and unique cultures to the federal judiciary.

A. The Indian Civil Rights Act Neither Explicitly Nor Implicitly Provides Federal Courts With Jurisdiction To Hear Private, Civil Causes of Action.

In the absence of an express grant by Congress, federal courts have no jurisdiction to settle intratribal controversies. *Native American Church of North America v. Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959); *Martinez v. Southern Ute Tribe of Southern Ute Reservation,* 249 F.2d 915 (10th Cir. 1957), *cert. denied,* 356 U.S. 960 (1958). The Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-03 (1970), empowers federal courts only to issue a writ of habeas corpus to protect any person unlawfully detained by an Indian tribe. 25 U.S.C. § 1303 (1970).

The ICRA contains no other explicit grant of jurisdiction over challenges to official actions by Indian tribal governments. *See* 25 U.S.C. §§ 1301-03 (1970); *Califano v. Sanders,* 97 S.Ct. 980, 984 (1977).

Nevertheless, the Tenth Circuit, relying upon its previous decision in *Dry Creek Lodge,*[2] held that it had jurisdiction to entertain Mrs. Martinez's claim. In *Dry Creek Lodge,* the Tenth Circuit had held that section 1302 of the ICRA implicitly granted federal courts the power to entertain a cause of action alleging a deprivation of equal protection of the laws.[3] NTCA strongly asserts that the implication of federal civil remedies against Indian governments is without warrant. If such remedies are to be created, only Congress, not the courts, can create them. Note, *Implication of Civil Remedies Under the Indian Civil Rights Act,* 75 MICH. L. REV. 210 (1976).

This Court on many occasions has followed the familiar canon of statutory construction that "where a statute creates a right and provides a special remedy, that remedy is exclusive." *Renegotiation Board v. Bannercraft Clothing Co.,* 415 U.S. 2, 18 (1974); *United States v. Babcock,* 250 U.S. 328, 331 (1919). The statutory language here demonstrates that Congress intended that only habeas corpus review of tribal actions be available under the ICRA.

The legislative history supports this construction of the Act, for Congress intended only a limited role for the federal courts in the enforcement of the ICRA.

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[2] *Dry Creek Lodge, Inc. v. United States,* 515 F.2d 926 (10th Cir. 1975).

[3] 515 F.2d at 933. The court recognized that several other courts had found jurisdiction under 28 U.S.C. section 1343(3). *Id.*

Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act,* 20 S.Dak. L. Rev. 1, 13 (1975). During its consideration of the ICRA, Congress focused on tribal administration of justice and the procedural rights of those charged with offenses before tribal courts; the legislators afforded much less attention to the specifics of tribal structure. *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation,* 507 F.2d 1079, 1082 (8th Cir. 1975); *Groundhog v. Keeler,* 442 F.2d 674, 682 (10th Cir. 1971); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments,* 82 Harv. L. Rev. 1343, 1356, 1359 (1969).

As originally introduced, the Act authorized appeals of *criminal* convictions from tribal courts to federal district courts, with trials de novo on appeal. *See* S. 962, 89th Cong., 1st Sess. (1965). Nowhere in the legislative record is there any suggestion that Congress ever remotely considered extending this right of appeal to civil cases. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act,* 20 S.Dak. L. Rev. 1, 10 (1975). The de novo criminal review provision was considered thoroughly during hearings and was stricken. The testimony revealed two major objections to this provision: Additional burden on the already overworked federal courts was feared,[4] and undue interference with the tribal law and order systems was stressed.[5] When S. 1843, which eventually became the

[4] *E.g., Hearings on S. 961-68 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess., at 19 (1965) (Remarks of Mr. Frank J. Barry, Solicitor, Dep. of Interior).

[5] *E.g., id.* at 66 (Remarks of Mr. Arthur Lazarus).

ICRA, was introduced, the bill provided only for habeas corpus review of tribal detentions. S. 1843, 90th Cong., 1st Sess. (1967).

The legislative record indicates that Congress interpreted the bill to mean just what it said: Federal courts have jurisdiction only to review petitions for a writ of habeas corpus.

The primary spokesman supporting the ICRA in the House, Representative Ben Reifel, considered the Act's purpose to be "to create a Bill of Rights for the protection of Indians tried by tribal courts, and to improve the quality of justice administered by tribal courts." 114 Cong. Rec. 9111 (1968). *See also id.* at 9112, 9552-53. During hearings on the effect of the ICRA, chaired by Senator Sam Ervin in 1969, Senator Ervin interpreted the Act thusly:

> This bill does not provide for the Federal courts to review all the decisions of the Indian courts. In fact, provision for Federal review was in there originally, and at the request of a number of tribes we eliminated it entirely. *The only provision in this bill that provides for Federal court interference is writ of habeas corpus,* and that probably exists as law now, although I am not quite certain. If the man was convicted in violation of a law, the Federal court would have the jurisdiction to issue a writ of habeas corpus. I don't imagine there would be too many of those.

Hearing on Title II of the Civil Rights Act of 1968 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess., at 15 (1969) (emphasis added).

There is no indication in the legislative record that Congress intended to subject all actions taken by tribal

governments to review by federal courts in civil actions. Surely if Congress had intended such a reversal of established practice, there would at least have been some discussion of this remarkable turnabout. *See Native American Church of North America v. Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959); *Martinez v. Southern Ute Tribe of Southern Ute Reservation,* 249 F.2d 915 (10th Cir. 1957), *cert. denied,* 356 U.S. 960 (1958). This circumstance is especially telling when one recognizes that every major civil rights act contains a jurisdictional provision enabling federal courts to hear cases brought under it. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act,* 20 S.DAK. L. REV. 1, 27 (1975). Congress knows how to provide federal courts with jurisdiction to enforce its civil rights acts. Congress did so in the ICRA, intentionally limiting the federal courts to review of unlawful detentions by tribal governments. The courts are bound by this congressional judgment. *See Califano v. Sanders,* 97 S.Ct. 980 (1977); 1 MOORE'S FEDERAL PRACTICE ¶ 0.60[2], [3] (2d ed. 1976).

Some have argued, however, that to deny individuals a general right to question tribal practices in federal courts would be to interpret the ICRA as extending to individuals rights without remedies. *See* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments,* 82 HARV. L. REV. 1343, 1371 (1969).

This simply is not the case.

The many executive and legislative actions taken by a tribe that are subject to review by the Secretary of the Interior must comply with the ICRA; otherwise,

the Secretary's approval would be invalid under the Administrative Procedure Act, which requires that agency action be in accordance with federal statute. *See* 5 U.S.C. § 706(2)(A) (1970). If a tribal action is not subject to Secretarial review, the proper forum in which to assert one's rights under the ICRA is in tribal court.

It is ethnocentric in the extreme to assume that federal courts are the only tribunals capable of protecting those individual rights guaranteed by the ICRA. Indian people, as Congress repeatedly has found, are competent to govern themselves. *See e.g.,* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (Supp. V 1975); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79 (1970). The Santa Claran Council is as able as a federal judge to understand the anguish of Mrs. Martinez and is better able to evaluate it in light of the Pueblo's concerns.

In sum, we suggest that the courts below mistakenly created jurisdiction to hear this case. It is crucial that Congress granted federal jurisdiction *only to issue writs of habeas corpus.* The legislative record supports the express legislative language: Congress has *not* provided individuals with a general right to challenge tribal actions in federal court. The courts are bound by this legislative decision.

B. Congress Did Not Intend To Waive Indian Tribes' Traditional Immunity From Suit When It Passed the Indian Civil Rights Act.

Each Indian tribe begins its relationship with the federal government as a sovereign, with powers subject to qualification only by treaties and by express congressional legislation; what is not expressly limited

remains within the domain of tribal sovereignty. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559-61 (1832); *Groundhog v. Keeler,* 442 F.2d 674, 678 (10th Cir. 1971); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (U.N. Mex. 1971). *See also United States v. Mazurie,* 419 U.S. 544, 556-57 (1975). It is because of this sovereignty that this Court long has recognized that an Indian tribe is immune from suit without consent. *Puyallup Tribe, Inc. v. Department of Game of Washington,* 45 U.S.L.W. 4837, 4839 (U.S. June 23, 1977); *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512-13 (1940); *Turner v. United States,* 248 U.S. 354, 358 (1919). Such consent must be explicit. *Dicke v. Cheyenne-Arapaho Tribes, Inc.,* 304 F.2d 113, 114 (10th Cir. 1962).[6]

The Tenth Circuit has neglected these principles. There is nothing in the language of the Act or in its legislative background to indicate that Congress intended to waive the immunity of Indian tribes from suit that has been recognized officially since 1895. *See Thebo v. Choctaw Tribe of Indians,* 66 F. 372 (8th Cir. 1895). Nevertheless, the court of appeals observed that "to the extent that the Indian Civil Rights Act applies, tribal immunity is thereby limited." 540 F.2d at 1042. This lifting by bootstraps is contrary to the principle that a waiver of tribal immunity must be explicit; it also ignores completely the effect of Title IV of the ICRA, 25 U.S.C. 1321-26 (1970). Title IV represents an attempt by Congress to correct the flaws of the assimilationist policy embodied by Public Law 280,

[6] The *Dicke* ruling is consistent with the decisions by this Court holding that a waiver of sovereign immunity by the United States, *United States v. Shaw,* 309 U.S. 495, 500-01 (1940), or by a state, *Edelman v. Jordan,* 415 U.S. 651, 673 (1974), must be express.

§ 7, 67 Stat. 590 (1953), by providing for future assumption of criminal and civil jurisdiction by the states over Indian reservations within their respective boundaries only with the consent of the Indian tribe. 25 U.S.C. §§ 1321(a), 1322(a), 1326 (1970); *Kennerly v. District Court,* 400 U.S. 423, 429 (1971).

It is inconceivable that Congress in the same statute expressly recognized the sovereign power of an Indian tribe to refuse to relinquish civil jurisdiction over its territory, but by unnecessary implication abrogated the power of a tribe to withhold its consent to a civil cause of action in federal court. *Cf. Morton v. Mancari,* 417 U.S. 535, 548 (1974.)

The doctrine of tribal immunity remains a part of the law not only as a recognition of inherent Indian tribal sovereignty, but also to protect the financial existence of Indian governments. Indian tribes cannot afford to defend constantly their laws, cultures, and traditions in federal court. Congress did not express any intention that this Court allow such a challenge to tribal existence, and this Court should infer none.

II. THE INDIAN CIVIL RIGHTS ACT, WHICH PROVIDES THAT NO INDIAN TRIBE SHALL DENY THE EQUAL PROTECTION OF ITS LAW, IS QUITE DIFFERENT FROM THE FOURTEENTH AMENDMENT'S PROHIBITION OF STATE ACTION DENYING EQUAL PROTECTION OF THE LAWS. THE INDIAN CIVIL RIGHTS ACT, ALTHOUGH IT IS SIMILAR, DID NOT TRANSPLANT THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ONTO INDIAN TRIBAL GOVERNMENTS.

Overlooked below, and we believe to be of determinative significance if this Court reaches the merits of the controversy, is that the equal protection provision of

the Indian Civil Rights Act *assumes the validity of Indian ordinances* enacted for a culture different from that of the United States and requires only that *those* laws, not *ours,* be applied equally.

The pueblos of Santa Clara [7] belong to the Tanoan linguistic stock,[8] and, more specifically, to the Northern Division of the Tewa Group.[9] The Tewa are Eastern pueblos and differ from the Western pueblos chiefly in their attitudes toward moiety and clan. Parsons, *The Kinship Nomenclature of the Pueblo Indians,* 34 AMERICAN ANTHROPOLOGIST 377, 380 (n.s. 1932). "Among the Tewa the patrilineal moiety is the paramount principle of social organization." *Id.* at 378. Among the Western pueblos, there is but a trace of moiety; those non-Tanoan pueblos are characterized by a clanship system that is matrilineal. *Id.* at 377.

In the traditional Tewa system, membership in the moiety, and, therefore, in the tribe, comes through the father. Ellis, *supra* note 8, at 33a.

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[7] "Pueblo," a Spanish word meaning "village" or "town," is a general term that was applied by the Spaniards, and later adopted by English-speaking people, to describe Indians who live in permanent stone or adobe houses built into compact communities in southern Colorado, central Utah, New Mexico, and the adjacent Mexican Territory. J. SWANTON, THE INDIAN TRIBES OF NORTH AMERICA 339 (Smithsonian Bur. of Amer. Ethnology, Bull. 145, 1952); F. HODGE, HANDBOOK OF NORTH AMERICAN INDIANS 318 (Smithsonian Bur. of Amer. Ethnology, Bull. 30, 1910).

[8] Pueblo Indians belong to four distinct linguistic stocks: Hopic, Zunian, Keresan, and Tanoan. *Id.*; Ellis, *The Pueblo Social Organization as Basis for Rules of Tribal Membership, printed in,* Brief of The Pueblo De Cochiti, *et al.,* in Support of Pet. for Cert., App. K, at 22a-23a.

[9] There are three groups of the Tanoan stock: Tewa, Tiwa, and Towa. Ellis, *supra* note 8, at 23a.

The Santa Clara Pueblo has not significantly changed its social organization in the last 95 years. (App., at 8a.) This community of approximately 1,200 people has so far successfully managed to withstand the constant pressures exerted by 210 million alien-Americans. Without question, the cohesive social, ceremonial, and political organization of the Pueblo has been responsible for this survival. E. DOZIER, THE PUEBLO INDIANS OF NORTH AMERICA 18 (N.Y. 1970). The membership ordinance under attack preserves the Santa Claran culture by ensuring that children will be brought up in the traditional way, with the father imparting to his children the tribal customs and religion. Congress, when it passed the ICRA, did not intend to weaken the bonds that will enable the Pueblo to exist as a distinct community 95 years from today. *Cf. Morton v. Mancari,* 417 U.S. 535, 553 (1974). It is for the Santa Clarans to decide for themselves, without assistance from the federal judiciary, how to preserve their unique way of life. Congress, through the ICRA, insists only that the tribal government administer its policies fairly and equally, which it has. (App., at 3a.)

The equal protection clause of the fourtenth amendment to the U.S. Constitution does not restrain the exercise of power by a tribal government. *See Talton v. Mayes,* 163 U.S. 376 (1896); *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation,* 507 F.2d 1079, 1081 (8th Cir. 1975); *Native American Church of North America v. Navajo Tribal Council,* 272 F.2d 131, 134-35 (10th Cir. 1959). *But see Colliflower v. Garland,* 342 F.2d 369 (9th Cir. 1965). Nevertheless, the Respondents, Br. in Opp. to Cert., at 9, and the Tenth Circuit below, 540 F.2d at 1047, assert

that fourteenth amendment precedent should form a "persuasive guide" to courts that consider challenges to tribal law under the equal protection clause of the ICRA, 25 U.S.C. § 1302(8) (1970). This is mere dialectical sleight of hand that leads to the same oppressive result. Respondents would reach a result Congress never intended.

The Respondents premise their contention on the asserted "identical" wording of the two equal protection clauses. Br. in Opp. to Cert., at 9. The Tenth Circuit appeared to share this view that Congress merely transplanted the equal protection clause of the fourteenth amendment onto the ICRA. 540 F.2d at 1044. However, this premise is incorrect, for Congress in the ICRA *did not apply the equal protection guarantee to the tribes verbatim*. The ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of *its* laws. . . ." 25 U.S.C. § 1302(8) (1970) (emphasis added).

The fourteenth amendment, however, states that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of *the* laws." U.S. Const. amend. XIV, § 1 (emphasis added).

That this modification in the language was intentional is supported by the legislative record. For example, in its endorsement of S. 1843, the Interior Department's substitute bill that later became the ICRA, the Senate subcommittee stated:

> The Department of Interior's bill would, in effect, impose upon the Indian governments the same restrictions applicable presently to the Federal and State governments with several notable exceptions, *viz*, the 15th amendment, certain procedural requirements of the 5th, 6th and 7th amendments, and, *in some respects*, the equal protection requirement of the 14th amendment.

Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., Report on Constitutional Rights of the American Indian, at 25 (Comm. Print 1966) (emphasis added). *See Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079, 1082 (8th Cir. 1975); *Groundhog v. Keeler*, 442 F.2d 674, 682 (10th Cir. 1971).[10]

The meaning of the equal protection clause of the ICRA seems clear: A tribe must exercise its powers in such a way that applies "its" laws equally to all persons within the tribe's jurisdiction. This guarantee does not authorize a federal judge to review the wisdom of the tribal law in question. Tribal representatives were consistently assured by Congress that the equal protection guarantee would only require that tribal law be administered fairly; it would not call into question tribal law itself. *E.g., Hearing on Title II of the Civil Rights Act of 1968 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., at 19, 40 (1969) (Remarks of Sen. Ervin).

This "equal application" approach to the ICRA equal protection guarantee has been adopted by every

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[10] Thus, the Tenth Circuit below was mistaken when it concluded that the legislative record revealed "no limitations" were placed on the incorporation of the equal protection clause into the ICRA. *See* 540 F.2d at 1044.

Circuit that has interpreted section 1302(8), except, of course, the Tenth Circuit. In *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231 (4th Cir. 1974), the Fourth Circuit considered equal protection and due process challenges against the tribe alleging an unlawful assignment by the tribe of part of the plaintiff's lands. *Id.* at 1232. The court concluded:

> Under the Indian Civil Rights Act the plaintiff was entitled to the right of procedural due process incident to the division of her father's possessory holdings, as well as the even-handed application of the tribal customs, traditions and any formalized rules relative to tribal land. . . . The Act, however, did not empower the court to go further and substitute its judgment on the merits for that of the Tribe.

Id. at 1237.

A battery of decisions by the Eighth Circuit reflect a similar approach to that taken by the Fourth Circuit in *Crowe*.[11] The Eighth Circuit has held that where a tribe has a "sufficient cultural interest" underlying its action, the equal protection requirement of the fourteenth amendment should not be embraced within the ICRA; only uniform application of tribal law should be required. *Daly v. United States*, 483 F.2d 700, 705-06 (8th Cir. 1973). Where Indian tribes had adopted Anglo-Saxon democratic processes for selection of

[11] *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976); *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079 (8th Cir. 1975); *Brown v. United States*, 486 F.2d 658 (8th Cir. 1973); *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973); *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973); *Lefthand v. Crow Tribal Council of Crow Tribe of Indians of Montana*, 329 F.Supp. 728 (D. Mon. 1971).

tribal representatives, however, the Eighth Circuit applied the one man-one vote principle as a necessary concomitant of the election process. *Id.* at 704-05. *See Means v. Wilson*, 522 F.2d 833, 839 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976). The reconciliation of these two lines of decisions was made clear by the court in *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079 (8th Cir. 1975). There the court held, *inter alia*, that the equal protection clause of the ICRA does not provide a basis for a federal court to enjoin a tribal council from preventing 18- to 21-year-old tribal members from voting in tribal elections. *Id.* at 1083. The ICRA, the court found, provided it no license to force an "alien culture" on an Indian tribe. *Id.* If a tribe adopts voting procedures that exactly parallel those found in American culture and that do not involve "such complexities as tribal membership or blood lines," however, the Eighth Circuit does not deem it a significant interference with any important tribal value to require a tribe to treat equally votes cast by its members. *Id.* But a court cannot use the ICRA to enfranchise a new class of the tribal population. *Id. See Daly v. United States*, 483 F.2d 700, 705-06 (8th Cir. 1973). The Ninth Circuit, in *Howlett v. Salish and Kootenai Tribes of Flathead Reservation, Montana*, 529 F.2d 233 (9th Cir. 1976), adopted the Eighth Circuit interpretation of the equal protection clause of the ICRA. *Id.* at 238-39.

Under this equal application approach, it is clear that the Santa Clara ordinance governing tribal citizenship is consistent with the equal protection guarantee of the ICRA. The Eighth Circuit decisions make clear that federal courts should not seek to conform

tribal membership requirements, which are based on Indian cultures, to the mandates of Anglo-Saxon culture, and they have been so applied. *Yellow Bird v. Oglala Sioux Tribe of South Dakota,* 380 F.Supp. 438 (D.S.D. 1974). The district court here also applied the Fourth, Eighth, and Ninth Circuit precedent, holding that the ICRA does not invalidate a tribal membership ordinance when the challenged classification is grounded on criteria that have been traditionally employed by the tribe in considering membership questions. 402 F.Supp. at 17-18. It is for the tribe, not a federal judge, to determine which traditional values will promote cultural integrity. *Id.* at 18. The role of the judiciary is only to ensure that tribal policies are administered fairly and equally. *See id.* at 17.

The Tenth Circuit did not hesitate to re-evaluate the tribal citizenship policy of the Santa Clarans in the light of its concept of fourteenth amendment law. The court thought it "persuasive" that the fourteenth amendment invalidates gender-based classifications. 540 F.2d at 1046-47. The court subjected the tribe's ordinance to a "compelling" interest standard, *id.* at 1047, which this Court has refused to apply to gender-based distinctions drawn by the states and by the federal government. *E.g., Craig v. Boren,* 97 S.Ct. 451, 457 (1976); *Stanton v. Stanton,* 421 U.S. 7 (1975); *Weinberger v. Weinberger,* 420 U.S. 636 (1975). Not surprisingly, the Tenth Circuit held that the tribe's membership ordinance could not withstand its strict scrutiny. 540 F.2d at 1047-48.

The Tenth Circuit's analysis should not be allowed to stand. First, assuming the crucial distinction at bar is gender-based, it is incongruous in the extreme to restrict the tribe under the ICRA to a greater extent

than the states and the federal government are restricted by the fourteenth amendment. *See Means v. Wilson,* 522 F.2d 833, 841 (8th Cir. 1975), *cert. denied,* 424 U.S. 958 (1976); *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation,* 507 F.2d 1079, 1083 (8th Cir. 1975); Note, *Equal Protection Under the Indian Civil Rights Act: Martinez v. Santa Clara Pueblo,* 90 HARV. L. REV. 627, 629-30 (1977).

The distinction between classes here, however, is not per se a gender distinction, but is a distinct classification of alien fathers as opposed to native fathers. It cannot be denied that the tribe has a legitimate governmental purpose, perhaps a religious purpose, in promoting and protecting the education and training of its members. Under the historical Santa Clara pattern of political, social, and religious training it cannot be imparted by an alien father.[12] The Santa Clarans permit aliens, male and female, to live among them, but they do not permit the progeny of alien fathers to become citizens. The admission of aliens into citizenship of any nation, we respectfully suggest, is a matter of privilege, not of right. *United States v. Ginsbery,* 243 U.S. 472, 474, 475 (1919).

This country, although it has always encouraged immigration and naturalization, has often regulated same through imposition of restrictions, prohibitions, and quotas too numerous to mention. *See United States v. Wong Kim Ark,* 169 U.S. 649 (1898). Authority of

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[12] The anthropologist Alfonso Oritz, of the Tewa San Juan Pueblo, has presented a classic study of the complex, traditional way of acculteration in the Tewa pueblos. A ORTIZ, THE TEWA WORLD: SPACE, TIME, BEING, AND BECOMING A PUEBLO SOCIETY (Chi. 1969).

the government of the United States, through the action of the legislative department, to restrict aliens from its territory is a proposition that is not open to controversy. *Chae Chan Ping v. United States,* 130 U.S. 581, 603-04 (1889)." In fact, "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Steam Navigation Co. v. Stranahan,* 214 U.S. 320, 339 (1909). Moreover, after Mr. Justice Frankfurter suggested, in *Galvan v. Press,* 347 U.S. 522, 530 (1954), a deportation case, that "much could be said for the view" that due process places some limitation on congressional power in this area "were we writing on a clean slate," he continued:

> But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history" . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . *But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.* . . .

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[11] *See also e.g., Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 210 (1953); *Mahler v. Eby,* 264 U.S. 32, 40 (1924); *Keller v. United States,* 213 U.S. 138, 143-44 (1909); *United States ex rel. Turner v. Williams,* 194 U.S. 279, 294 (1904); *Fok Young Yo v. United States,* 185 U.S. 296, 302 (1902); *Ekiu v. United States,* 142 U.S. 651, 659 (1892). *Cf. Graham v. Richardson,* 403 U.S. 365, 377 (1971).

> We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens. . . .

Id. at 531-32 (emphasis added). *Kleindienst v. Mandel,* 408 U.S. 753, 766-67 (1972).

Furthermore, in *Kleindienst v. Mandel,* 408 U.S. 753 (1972), this Court again reaffirmed these general principles in the context of not permitting an alien to enter the United States in accord with executive discretion in direct contravention to conceded first amendment rights of United States citizens.

We see no reason that the deference accorded the legislative and executive branches of the federal government in the area of execution of immigration and naturalization policies should not form a "persuasive guide" to the judiciary when attempting to decide upon the validity of the quasi-autonomous Santa Clara Pueblo citizenship policies. *See* F. COHEN, HANDBOOK of FEDERAL INDIAN LAW 133-37 (U.N. Mex. 1971).

More fundamentally, however, if a federal court decides to second-guess tribal membership policy, due respect must be afforded the tribe's underlying interests. Courts, without exception, have held that the ICRA is not co-extensive with the equal protection clause of the fourteenth amendment. *E.g., Howlett v. Salish and Kootenai Tribes of Flathead Reservation, Montana,* 529 F.2d 233, 237 (9th Cir. 1976); *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation,* 507 F.2d 1079, 1082 (8th Cir. 1975);

Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971). These courts have acknowledged that the legislative history of the ICRA reflects an intent to protect the individual rights of Indians, while fostering tribal self-government and cultural identity. *E.g., Howlett v. Salish and Kootenai Tribes of Flathead Reservation, Montana,* 529 F.2d 233, 238 (9th Cir. 1976); *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation,* 507 F.2d 1079, 1082 (8th Cir. 1975); *Crowe v. Eastern Band of Cherokee Indians, Inc.,* 506 F.2d 1231, 1237 (4th Cir. 1974). Thus, a court that reviews the merits of a tribal ordinance should warily be guided by fourteenth amendment precedent because the interests of states and the federal government underlying a classification only rarely can be equated with the tribal interests underlying a similar classification. A court must determine whether the tribal classification rationally furthers a legitimate tribal interest.

The district court below found as a fact that the challenged classification is "rooted in . . . traditional values." 402 F.Supp. at 16. The Santa Clara Pueblo's patrilineal and patrilocal tradition survives. *Id.* Citizenship flows only through the father, not the mother. The father teaches the child how to grow up a Santa Claran, not the mother. To the Santa Claran, it is the cultural background of the father that is all-important. That the appellate judges do not find these traditions to be "compelling" is not important; they are rational; it is sufficient that the Santa Clarans, as a self-governing people, have decided to embody these traditions in their membership code.

The 1939 ordinance in no way reflects a society that discriminates against women. As the anthropologist Elsie Clews Parsons demonstrated:

> Distinctions of sex are marked in the Pueblo in culture, in dress, in occupations, and in the ceremonial life. The distinctions are a matter of division of functions between the sexes rather than of subordination of one sex to the other. The house and all the activities which center in the house appertain to women, the outside or public life to men. Even when women share in the public ceremonial life, their roles follow lines of domestic concerns, e.g., providing food for the fetiches . . . and for the ritual impersonators, the priests, the doctors.

Parsons, *The Kinship Nomenclature of the Pueblo Indians,* 34 AMERICAN ANTHROPOLOGIST 377, 378 (n.s. 1932). (See App., at 7a-8a.)

The appellate court derided the Pueblo's ordinance as "the product of economics and pragmatics." 540 F.2d at 1047. But the district court found as a fact that the ordinance fostered the economic survival of the tribe. 402 F.Supp. at 15. This Court has recognized the importance of a tribal economy in the preservation of a self-determining tribal society. *E.g., Williams v. Lee,* 358 U.S. 217 (1959). The needs of any Indian tribe to define itself and to preserve its culture and economy undoubtedly justify the Santa Clara Pueblo's membership criteria. Note, *Equal Protection Under the Indian Civil Rights Act: Martinez v. Santa Clara Pueblo,* 90 HARV. L. REV. 627, 629 n. 27 (1977).[14]

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[14] The Tenth Circuit also thought it important that the challenged ordinance was passed as late as 1939. 540 F.2d at 1047. The court apparently did not realize that the laws of most Indian tribes

This case presents this Court with the fundamental question of whether Indian tribes truly should be allowed to survive in the United States as culturally distinct, self-governing peoples. As has been mentioned, it is clear that Congress now follows a policy that fosters this tribal self-determination and that the ICRA furthers, rather than hinders, this policy. There is no indication that Congress intended to vest federal courts with the power to sit in judgment over Indian traditions and cultures, or, as the Tenth Circuit did, decide which traditions are necessary to the survival of Santa Claran culture and which are not. 540 F.2d at 1047-48. Courts should not arrogate to themselves this awesome authority without clear and express direction from Congress. This is especially true of membership ordinances, which, as the district court found, provide "a mechanism of social, and to an extent psychological and cultural, self-definition." 402 F.Supp. at 15. Each tribe has its own culture; each tribe defines itself in its own way. Uniform membership guidelines simply cannot be drawn.

Federal courts have no power to decide which tribal traditions should be perpetuated and which should not.

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were not written until Congress passed the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79 (1970). *See* Burnett, Jr., *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 HARV. J.LEG. 557, 577 (1972). The Santa Clara Pueblo adopted its written Constitution and Bylaws under the Act in 1935, Pet. for Cert., at 8, and adopted the present ordinance within four years. This ordinance has remained unchanged since enactment and was found by the district court to have been based on traditional tribal membership policies in practice before the formal written rule was established, 402 F.Supp. at 18. The Tenth Circuit was incorrect in its belief that the challenged classification "is of relatively recent origin . . . ." 540 F.2d at 1048. (See App., at 1a, 4a, 5a-6a, 7a, 8a.)

Under the ICRA, courts are mandated only to ensure that these criteria, whatever they may be, are applied fairly and equally. The district court found that the Santa Claran membership policies, like those of other tribes, provide the means by which the Santa Claran culture can survive while surrounded by an alien culture. It would be bitter irony if the principles of the alien culture were used to destroy the distinctiveness of the various tribal cultures now existing precariously within this country. This only Congress can do.

CONCLUSION

We respectfully suggest that both courts below were wrong in holding they had jurisdiction. They created, judicially, a jurisdiction that Congress did not give them. This assumed jurisdiction would subject Indian tribes to a constant flow of litigation attacking this, that, or the other facet of Indian culture. The Tenth Circuit Court of Appeals gravely erred by, in effect, holding that the United States Constitution rather than tribal governments should determine who shall be members of Indian tribes.

We respectfully pray that this Court reverse the judgment of the Tenth Circuit and remand the case with directions to dismiss the case.

Respectfully submitted,

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APPENDIX

APPENDIX

Excerpts from Transcript and Summary of Testimony in the United States District Court for the District of New Mexico

The district court found as a fact that the Santa Clara Pueblo has been and remains a patrilineal and patrilocal society. 402 F. Supp. at 16. We have complained in the preceeding brief that the court of appeals set this finding aside as a mere conclusion. Below are excerpts from the transcript and references to quotations from the testimony showing the substantial evidentiary basis on which the district court, as fact-finder, acted.

Examination of the record reveals no contradictory evidence.

The Governor of the Santa Clara Pueblo, Mr. Paul Tafoya, was the first tribal official to testify to the rationale underlying the gender-based classification in the 1939 citizenship ordinance:

> A. It was my understanding, in discussing these matters with the old people, that this was a rule that was carried on and it was my understanding that in the year 1939, it surfaced and, at that time, it became a written guideline.
>
> Q. Was the rule, as far as you know, that way prior to 1939?
>
> A. It was my understanding that it was. It was my understanding, through the people that I discussed this matter with, it was my understanding that's the way it was before the Constitution was adopted.
>
> • • • •
>
> Q. Governor, would you explain to the Court the difference in the status of a male in a Pueblo society as compared to that of a female in the religious privileges?

A. [Governor Tafoya explained that he was prohibited from discussing the particulars of the Santa Clara religious practices in public.]

But I can state one thing: That the male Santa Clara Indian truly has that responsibility to teach and train and expose his family to the way of the Indian people, and this involves quite a bit within the Indian culture.

Now, I'm talking about the Santa Clara Indian culture and it is his responsibility, much more than it is the responsibility of a female member of the tribe.

Transcript, at 108-09.

Governor Tafoya explained that, "In the Santa Clara Pueblo, the male is always considered the head of the house." Transcript, at 110. It is the male (if not the husband, then an uncle or a cousin) "that passes down such traditions, customs from generation to generation." Transcript, at 115. Historically, when a Santa Claran female married a non-Santa Claran, "according to the older people on the reservation, they usually traveled with their husbands." Transcript, at 115.

Finally, Governor Tafoya was asked:

Q. In your opinion, what would happen to the Santa Clara culture if you quit enforcing the Ordinance of 1939?

A. It would tend to destroy the Pueblo as a whole because there would actually be no Government, no organization . . . .

Without it, we would have an influx of people that we don't know who they are. They would come in from all directions; Indians and non-Indians alike.

So, it would be a destruction on the Santa Clara Indian culture.

• • • •

Q. What is your prime concern insofar as this lawsuit is concerned?

A. My prime concern, as far as this lawsuit is that we like to keep our Government. We like to be a responsible people. We know what our community is all about.

We know the people, the traditions and customs, the ceremonies, the religious life, the entire thing that makes the Indian and his way of life. That is, to me, is very important.

Membership, at this point in question, is very important. I think the community is concerned very much so about the general membership of the tribe, and I am sure that, eventually, they will work out their own problems.

Transcript, at 116-17.

During crossexamination, the Governor indicated that there has been no naturalized citizens admitted to the Pueblo since the 1939 ordinance became law. Transcript, at 118. When asked whether the 1939 ordinance is essential, he replied:

This is the only way we can protect and preserve our culture. If we let outside influences come in, that would tend to destroy what we now have. Then what's the sense of having a Tribal Government?

Transcript, at 140. Then why, Governor Tafoya was asked, did the Pueblo allow non-Indian wives' children to be enrolled? Isn't that an outside influence? To which the Governor simply replied:

> It is, but, again, I repeat, it is still the responsibility of the male member, who is the head of the family, it is his responsibility to teach his people the Indian way of life.

Transcript, at 140.

During his redirect examination, Governor Tafoya was asked for the Pueblo's rationale behind allowing the children of Santa Claran mothers who are born out of wedlock to become tribal members:

> I think the primary concern behind it is the fact that they have no other place to go, that we do recognize them to be half Santa Clara on the mother's side, not truly knowing who the father will be.
>
> But in this case, because they have no other land, they have no other tribe to go to, they have no father, and, therefore, or they may have a father but not knowing who the father is, but the fact is that we are responsible for our people and, in this respect, we do open membership to them.

Transcript, at 145. Governor Tafoya explained that even the mother of an illegitimate child does not assume the responsibility of teaching the child; this role is assumed by the *male* members of the mother's family. Transcript, at 145.

Mr. Jose Gene Naranjo, Community Director at Santa Clara since 1968, was Secretary under the Constitution in 1936, the first year of its operation. Transcript, at 151. Mr. Naranjo explained that the gender-based distinction in the 1939 ordinance had been "handed down from generation to generation. So it was there long before the Constitution was even thought of." Transcript, at 153. The rationale underlying this rule was explained to Mr. Naranjo by his uncles, who were past-Governors of the Pueblo:

> Well, they have always said that the man is the head of the family; anytime he takes a wife, well, that's his responsibility. That's his responsibility to take care, to provide, to protect the wife that he takes, and wherever he's from, if he's from the Pueblo, that's where he stays unless he wants to get on.
>
> If he is from outside, well, there's where he should have taken his wife.

Transcript, at 155. It was the usual case for Santa Claran women who married outsiders to live off the reservation in their husband's homes. Transcript, at 156. Mr. Naranjo explained the reason for the 1939 ordinance thusly:

> Well, the 1939 Ordinance, I guess, was due to the fact that they have seen more and more outside marriages coming into the tribe, and for that reason, they thought they would have problems with the mixed marriages, with the children. So that's the reason this was stopped.

Transcript, at 155.

Similarly, Mr. Amerante Silva, Director of Social Services of the Santa Clara Pueblo, gave this reason for the 1939 ordinance:

> [T]he man was considered the head of the household and he has the sole responsibility, and then on the basis of the outsiders coming through, coming in, no, that was one of the bases, I'm sure, that the elders at that time foresaw that thing that was coming in, so that was the closing of that, or the making of that Ordinance.

Transcript, at 186. Mr. Juan Chaverria, a resident of Santa Clara and a former Governor of the Pueblo, also indicated that the distinction under challenge "always

has been the rule of the tribe since immemorable." Transcript, at 208. The rule governing the citizenship of illegitimates also "has been practiced for years and years, for generations and generations." Transcript, at 211.

The testimony of the above members of the Santa Clara Pueblo was corroborated by the expert study and opinions of Dr. Florence Hawley Ellis, Professor Emeritus of Anthropology, University of New Mexico. The U.S. Department of Justice had requested Dr. Ellis to write a brief report on the Santa Clara Pueblo in connection with this suit, before the Secretary of Housing and Urban Development was dismissed as a party. Transcript, at 231. Although Dr. Ellis testified for the Pueblo, her research was not done at the request of the Tribe. Transcript, at 231. Dr. Ellis's paper, "Santa Clara Social Organization and Citizenship," was introduced into evidence as Plaintiff's Exhibit No. 1.

Dr. Ellis's research indicated that, in Santa Claran rules governing citizenship, "[t]he principle considered to be fundamental to those regulations was that a man, especially in the Tewa system but also within that of the more matrilineally oriented Keresan pueblos of the Rio Grande and of Zuni farther to the west, was looked upon as head of the family." Plaintiff's Exh. No. 1, at 25. This principle interacted with the jealous manner in which Santa Clarans guarded their unique identity to form the general rules governing the Pueblo. *See* Transcript, at 236-37. First, marriage should be made within the Pueblo. Plaintiff's Exh. No. 1, at 25. However, to the considerable concern of the tribal elders, some mixed ma.riages did occur. *Id.* at 25-26. Dr. Ellis found:

> [B]ased upon the Pueblo concept of the male being head of the family, functionally, an idea encouraged by Spanish American and Anglo neighbors, was that

> a man who married outside his tribe should take his wife home to his own tribe and area and his children should be enrolled as members of his tribe. This plan followed the patrilineal emphasis in Tewa moiety membership . . . .

Id. at 26. Santa Clara recognized a corolary to the above-stated rule when the outsider wished for his family to live at the Pueblo: "Whenever a person had lived in the pueblo for some years and had made his contribution by participating in community work when the period for such tasks as cleaning the plazas, opening the irrigation ditches, and plastering the church was announced by the governor, his name could be brought up by someone in a council meeting and he could be accepted as a pueblo member . . . ." *Id.* However, this possibility of naturalization obtained only during the "old days" when mixed marriages were uncommon. *See id.* at 29.

In her paper, Dr. Ellis drew a crucial distinction. The Santa Claran system does not discriminate against males or females, but rather distinguishes clearly between the roles each sex is expected to perform in the Pueblo. "I have never heard an adult Pueblo woman complain of being downtrodden, and my own observations since the late 1920's have persuaded me that in the Pueblo social system women held a higher position than in our own." Plaintiff's Exh. No. 1, at 29-30. Dr. Ellis explained:

> Division of labor and responsibilities by sex, however, is pronounced: this is not a matter of inequality but of specialization between the sexes in certain categories of group activities. Men were considered to be the heads of families. In the past young people were advised to marry inside the pueblo.

Id. at 32.

Dr. Ellis summarized her findings as follows:

> Following the concept of sex specialization, men run the Tewa religious system. Women, with one single exception, are assistants in this line. Concomitantly, men run the political system and women characteristically know little about what is going on. Women, however, are very important in economics and enjoy individual ownership of various things, do much of the purchasing, may be the family bankers, and are expected to speak in relation to use of moneys.
>
> During the 95 years covered by our reports on the Tewa, no major changes in social organization took place. The two major developments in the Santa Clara system consisted of the formalization of two factions per moiety, with their leaders, and introduction of a voting system for secular officers. The constitution was largely a written statement of older customs pertaining to secular government.

Id. at 33.

At trial, Dr. Ellis concluded:

> Q. Doctor, in your opinion, based upon your studies and readings and persoral observations, and the testimony that you have given here today, if Santa Clara allowed their women to marry non-Santa Clarans, and if their children became members, do you foresee any possible results from this.
>
> A. Well, because of the importance of men in connection with the carrying on of the culture, the training of the children in the socio-religious situations, the culture eventually would break down and be lost.

Transcript, at 251.

MOTION FILED
JUL 1 5 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-682

SANTA CLARA PUEBLO, et al., *Petitioners,*

v.

JULIA MARTINEZ, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION TO FILE BRIEF AMICI CURIAE
and
BRIEF OF AMICI CURIAE
of

THE PUEBLO DE COCHITI, THE PUEBLO OF ISLETA, THE PUEBLO OF JEMEZ, THE PUEBLO OF LAGUNA, THE PUEBLO OF SANDIA, THE PUEBLO OF ZIA, THE PUEBLO OF SAN FELIPE, THE PUEBLO OF SAN ILDEFONSO, THE PUEBLO OF TAOS, THE HUALAPAI TRIBE, THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION AND THE ALL-INDIAN PUEBLO COUNCIL, INC.

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Crowe v. *Eastern Band of Indians, Inc.* 506 F. 2d 1231 (4th Cir. 1974) 8
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Dickie v. *Cheyenne-Arapahoe Tribes, Inc.*, 304 F. 2d 113 (10th Cir. 1973) 2
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O'Neal v. *Cheyenne River Sioux Tribe*, 482 F. 2d 1140 (8th Cir. 1973) 8, 14
Pinnow v. *Shoshone Tribal Council*, 314 F. Supp. 1157 (D. C. Wyo., 1970) 3
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Yellowbird v. *Oglala Sioux Tribe*, 380 F. Supp. 438 (D.C. S.D. 1974) 3, 8, 10

FEDERAL STATUTES:

Act of April 11, 1968 (84 Stat. 77 et seq., 25 U.S.C. Sections 1301 et. seq.) 2, 3, 4, 5, 7

OTHER AUTHORITY:

1968 U. S. Cong. and Adm. News P. 183 14

Lazarus, Title II of the 1968 Civil Rights Act: Indian Bill of Rights, N.D.L. Rev. Vol. 45, No. 3 7

United States Department of the Interior, Office of the Solicitor, Solicitor's Opinion M-27781, POWERS OF INDIAN TRIBES (1934) 12-13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-682

SANTA CLARA PUEBLO, et al., *Petitioners,*

v.

JULIA MARTINEZ, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Come now The Pueblo de Cochiti, The Pueblo of Isleta, The Pueblo of Jemez, The Pueblo of Laguna, The Pueblo of Sandia, The Pueblo of San Felipe, The Pueblo of San Ildefonso, The Pueblo of Taos, The Pueblo of Zia, The Hualapai Tribe, The Salt River Pima-Maricopa Indian Community, The Confederated Tribes of the Umatilla Indian Reservation and The All-Indian Pueblo Council, Inc., pursuant to Supreme Court Rule 42, by and through their attorneys, and allege:

1. The movants herein other than the All-Indian Pueblo Council, Inc., are Indian Tribes duly recognized by the Federal Government, exercising

powers of self-government and subject to the provisions of the Act of April 11, 1968 (84 Stat. 77 et seq.; 25 U.S.C., Sections 1301 et seq.) hereinafter called the Indian Civil Rights Act (ICRA).

2. The All-Indian Pueblo Council Inc., is an organization consisting of the nineteen Indian Pueblos located in New Mexico, duly chartered as a non-profit corporation under the laws of the State of New Mexico, the purpose of which is to act in concert for the advancement of goals common to the Indian Pueblos of New Mexico.

3. Consent has been obtained from the Petitioners to file this motion and a brief amici curiae in this cause. Consent has not been obtained from the Respondents.

4. The basic questions of law herein are:

(1) Does the ICRA vest the Federal Courts with the jurisdiction to determine questions of tribal membership?

(2) If the Federal Court does have such jurisdiction, does the Indian Civil Rights Act prohibit an Indian tribe, in the exercise of self-government powers, from enacting or enforcing an ordinance which imposes different membership standards on the acquisition of tribal membership, based on the sex of the member parent of a child seeking membership?

These questions are of utmost concern and importance to the movants herein for the reason that the decision of the Tenth Circuit in *Martinez, et al.* v. *Santa Clara Pueblo, et al.*, 540 F. 2d 1039, will, if affirmed, severely cloud long standing traditions, including the training of males for membership in pueblos, and erode the authority of these pueblos and tribes

to determine their own membership and membership standards and will also cause serious disturbance of religious cultural and traditional patterns of living in these tribes and pueblos.

5. The above questions of law will not be adequately presented to this Court for the reason that the facts presented to the trial court, as reviewed by the Tenth Circuit, do not and cannot show the impact of this question of law upon the religious, cultural and traditional patterns of living in these tribes and pueblos.

WHEREFORE, all of the above-named tribes and Pueblos and the All-Indian Pueblo Council, Inc., respectfully move this court for an order allowing them to file a brief amici curiae on the merits in support of the Respondents.

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BRIEF OF AMICI CURIAE

I.

INTEREST OF AMICI CURIAE

The amici curiae herein adopt in full the statement of *Interest of Amicus Curiae* set forth in their brief in support of the Respondents Petition for Writ of Certiorari heretofore filed and allowed in this cause upon such petition, cause No. 76-682, October Term, 1976.

II.

ARGUMENT

Point One

THE DECISION BELOW INCORRECTLY HOLDS THAT THE INDIAN CIVIL RIGHTS ACT CONSTITUTES A WAIVER OF SOVEREIGN IMMUNITY OF INDIAN TRIBES.

This court has never had the occasion to determine if the Act of April 11, 1968 (84 Stat. 77 et seq.; 25 U.S.C., Sec. 1301 et seq., in particular, Sec. 1302), commonly called the Indian Civil Rights Act (hereinafter "ICRA") implies a waiver of sovereign immunity.

It is beyond dispute that Indian tribes are sovereign, except as may expressly be limited by Act of Congress or treaty. *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1 (1831); *Worchester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832): *Talton* v. *Mayes,* 163 U.S. 376 (1896); *Toledo* v. *Pueblo de Jemez,* 119 S. Supp. 429 (D.C. N.M. 1954). One of the attributes of this sovereignty is immunity from suit except by virtue of an express waiver by Act of Congress. *United States* v. *United States Fidelity Co.,* 309 U.S. 506 (1940). The Court below has so held regarding dispute between a tribe and its members. *Dickie* v. *Cheyenne-Arapahoe Tribes, Inc.,* 304 F. 2d 113 (10th Cir. 1962); *Native American Church* v. *Navajo Tribal Council,* 272 F. 2d 131 (10th Cir. 1959).

The Tenth Circuit clearly reversed this direction and held that the ICRA is an implied waiver of sovereign immunity. This decision is a clear contravention of the principle that a governmental act is not waived by implication. *United States* v. *King,* 395 U.S. 1 (1969).

The ICRA contains no express waiver of sovereign immunity, except, perhaps, with respect to writs of habeas corpus, 25 U.S.C., Sec. 1303. Absent an express declaration of waiver, this court must conclude that the ICRA did not waive sovereign immunity in such an important aspect of tribal government as the standards and criteria incident to membership in the tribe. The Congress allowed writs of habeas corpus to be filed for alleged ICRA violations, nothing more. This must be construed as a non-waiver in all other cases.

It is admitted that lower courts are in conflict on this question. Decisions of the lower courts are in conflict with respect to whether Section 1302 of the Indian Civil Rights Act is a waiver of immunity. Compare *Wounded Head* v. *Tribal Council of the Oglala Sioux Tribe,* 507 F. 2d 1079 (8th Cir. 1975); *Pinnow* v. *Shoshone Tribal Council,* 314 F. Supp. 1157 (D.C. Wyo. 1970), aff'd on other grounds sub nom. *Slattery* v. *Arapahoe Tribal Council,* 453 F. 2d 278 (10th Cir. 1971); *Yellow Bird* v. *Oglala Sioux Tribe,* 380 F.Supp. 438 (D.C. S.D. 1974); *Jacobson* v. *Forest County Patawatomi Community,* 389 F. Supp. 994 (D.C. Wis. 1974) with *Martinez* v. *Santa Clara Pueblo,* 540 F. 2d 1039 (10th Cir. 1976); *Dry Creek Lodge, Inc.* v. *United States,* 515 F. 2d 926 (10th Cir. 1975); *Brown* v. *United States,* 486 F. 2d 658 (8th Cir. 1973); *Johnson* v. *Lower Elwha Tribal Community,* 484 F. 2d 200 (9th Cir. 1973); *Daly* v. *United States,* 483 F. 2d 700 (8th Cir. 1973). We submit that this court must resolve this conflict by a clear assertion and reiteration of the rule of non-waiver except by express Congressional enactment.

Point Two

THE ICRA EQUAL PROTECTION CLAUSE DOES NOT PERMIT COURTS TO IMPOSE COMPLETE FOURTEENTH AMENDMENT STANDARDS ON TRIBAL ACTION. EQUAL PROTECTION UNDER THE ICRA MUST BE VIEWED FROM THE TRIBAL CONTEXT.

Assuming, *arguendo*, that the Federal Courts have jurisdiction to inquire into equal protection attacks on tribal membership action, such jurisdiction should not be asserted to impose on tribes the full panoply of Fourteenth Amendment equal protection law. This is apparent from a review of ICRA equal protection decisions prior to the decision below in this case.

Prior to the enactment of the ICRA, neither the first ten amendments to the United States Constitution nor the Fourteenth Amendment were applicable to the actions of Indian tribes. *Talton* v. *Mayes, supra; Native American Church* v. *Navajo Tribal Council, supra; Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation,* 259 F. 2d 553 (8th Cir. 1958); *Twin City Chippewa Tribal Council* v. *Minnesota Chippewa Tribe,* 270 F. 2d 529 (8th Cir. 1959). Indian tribes, as sovereign entities with inherent internal sovereignty, were not subject to the Constitutional restrictions applicable to Federal and State action.

The decision in *Native American Church* triggered activity to have Congress legislate some actionable restraints on arbitrary tribal action in deprivation of the basic rights of persons subject to tribal jurisdiction. The legislative result was the ICRA. The portion of the ICRA pertinent here is 25 U.S.C. Sec. 1302 (8) which states:

> "No Indian Tribe in exercising powers of self-government shall—
>
> * * *
>
> (8) deny to any person within its jurisdiction *the equal protection of its laws* or deprive any person of liberty or property without due process of law (emphasis supplied); * * *"

The legislative history of the ICRA indicates clearly that the Congress did not intend for non-Indian, anglo-saxon, Fourteenth Amendment equal protection standards to be applied per se to actions of Indian tribes. The Tenth Circuit recognized as much in *Groundhog* v. *Keeler,* 442 F. 2d 674 at pages 681-82 (1971), when discussing the Interior Department substitute for S. 961, the original Indian Civil Rights proposal:

> "The Department of Interior's bill would, in effect, impose upon the Indian governments the same restrictions applicable presently to the Federal and State governments with several notable exceptions, viz., the 15th amendment, certain of the procedural requirements of the 5th, 6th, and 7th amendments, *and, in some respects, the equal protection requirement of the 14th amendment* (emphasis supplied)".

And in *Lohnes* v. *Cloud,* 366 F. Supp. 619 (D.C. N.D. 1975), the court said, at page 261, citing *Solomon* v. *La Rose,* 335 F. Supp. 715, 718 (D.C. Neb. 1971):

> ". . . that its was the intent of Congress in enacting the Indian Civil Rights Act to create sui generis a body of substantive rights, patterned *in part* on the Federal Bill of Rights, to extricate the individual Indian from (a) legal to no man's land (emphasis supplied) . . ."

The approach taken in *Groundhog, Lohnes* and *Solomon* is well-founded in the legislative history of the ICRA. Hearings on Indians civil rights legislation were held on June 22, 23, 24 and 29, 1965. Hearings, Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, 89th Cong. 1st Session, G.P.O., 1965. One of the bills being proposed was S. 961 which would have subjected the tribes to the entire spectrum of the first ten and the Fourteenth Amendments.

At these hearings, Mr. Arthur Lazarus, attorney for the Association of American Indian Affairs, Inc., testified prophetically to the precise issue now before the Court. Mr. Lazarus said:

> "* * * Secondly, S. 961 unintentionally would impair tribal sovereignty in areas unrelated to individual rights and on matters where change would be, and is, opposed by an overwhelming majority of the people. Among the Indian nations in the State of New York, for example, eligibility for tribal membership descends exclusively through the female line and, in addition, only tribal members may qualify to inherit interests in reservation land—both traditional practices which the Senecas and Tuscaroras clearly wish to preserve, but which might be barred by the equal protection clause or some other provision of the Constitution. Similarly, constitutional principles regarding the separation of church and state could cause serious difficulties among some of the pueblos in New Mexico, while the doctrine of 'one man, one vote' has no valid application to an Indian tribe still governed by a chiefs council.
>
> "* * * Perhaps the major problem posed by S. 961, however, is the attempt in this legislation to impose upon all Indian communities at one fell swoop a sophisticated legal system which has been developing in our society over a period of centuries. I suggest that Indian tribes vary—each having different resources, customs, size, degree of education or assimilation, etc.—and that the proposed establishment of one set of legal rules for all tribes is unworkable and unwise. I further suggest that it is not realistic to expect Indians (or any other nation) to learn respect for our constitutional principles when their application is required by legislative direction from outside and does not grow out of the actual operations of tribal government. * * *"

S. 961 did not become law. Eventually, another bill, S. 1843, became the ICRA. For a summary history of the route of S. 1843 through the Congress, see *Lazarus, Title II of the 1968 Civil Rights Act: An Indian Bill of Rights,* N.D.L. Rev., Vol. 45, No. 3.

Prior to the decision of the Tenth Circuit in this case, the courts have consistently recognized that equal protection under the ICRA is not equivalent to equal protection under the Fourteenth Amendment. An excellent statement of this basic policy is found in *Wounded Head et al.* v. *Tribal Council of Oglala Sioux Tribe, supra.* In *Wounded Head,* the Plaintiffs, members of the Oglala Sioux Tribe between the ages of 18 and 21, attacked the Oglala Sioux voting franchise rules providing for a minimum voting age of 21. The Plaintiffs' asserted that the equal protection clause of Section 1302 (8) included the Federal Twenty Sixth Amendment, lowering the voting age to 18. The Eighth Circuit rejected this contention, holding that absent specific Congressional legislation to the contrary, the right of franchise in a tribal election was exclusively a tribal decision. The court said that the purpose of the

ICRA was to impose certain governmental restrictions on tribes which were applicable to states and the Federal Government while at the same time to preserve tribal self-government and cultural identity. Therefore, the equal protection clause in the ICRA was to be viewed in the context of tribal governmental and cultural background and was not co-extensive with the equal protection clause of the Fourteenth Amendment.

More importantly, it had been held that tribal membership provisions are not subject to judicial examination for alleged equal protection violations unless it can be shown that these provisions were not uniformly applied. *Yellowbird* v. *Oglala Sioux Tribe of South Dakota, supra.* And in *Daly* v. *United States et al., supra,* it was held that blood quantum requirements for holding tribal office greater than the blood quantum requirements for voting did not violate ICRA equal protection. See also *O'Neal* v. *Cheyenne River Sioux Tribe,* 482 F. 2d 1140 (8th Cir. 1973), *White Eagle* v. *One Feather,* 478 F.2d 1311 (8th Cir. 1973), and *Crowe* v. *Eastern Band of Cherokee Indians, Inc.,* 560 F. 2d 1231 (4th Cir. 1974).

The courts which have assumed jurisdiction have rendered certain decisions on equal protection. In *Daly* v. *United States, et al., supra,* the Eighth Circuit distinguished the matter of office holding from the question of an alleged malapportionment of tribal representatives in violation of the one-man, one vote rules stemming from *Baker* v. *Carr,* 369 U.S. 186 (1962). Therefore, on the reapportionment issue, *Daly* held that when the tribe had established a system of incorporating non-Indian standards of election of officers, the tribe must submit to some reapportionment stand-

ard. The same result was obtained in *White Eagle* v. *One Feather, supra,* wherein the Court said:

> "We need not explore upon this record the degree to which Federal Courts may assert jurisdiction over tribal elections in all circumstances. *Our problem has no such complexities as tribal membership or blood lines.* The tribe itself, in the case before us, has established voting procedures precisely paralleling those commonly found in our culture, if not taken verbatum therefrom. Here, then we have no problem of forcing an alien culture, with strange procedures, on this tribe (emphasis supplied)".

From these decisions, consistent principles evolved, viz:

1. Equal protection under the ICRA is not as broad as equal protection under the Fourteenth Amendment.

2. The particular cultural context or environment in which the equal protection question arose will be of utmost importance, probably decisive, in the case.

3. The closer a tribe has developed rules similar to that of the anglo-saxon legal and political system, the closer the ICRA equal protection clause will be construed as being consistent with Fourteenth Amendment standards. Conversely, tribal customs alien to the anglo-saxon legal tradition will not be viewed in light of Fourteenth Amendment requirements, but instead viewed in the tribal cultural context.

4. The overriding consideration in any ICRA equal protection case is whether or not the questioned tribal rule, custom or tradition is being administered with an even hand.

Assuming a waiver of sovereign immunity, are tribal membership disputes a proper matter for ICRA judicial inquiry? The answer appears to be a qualified "Yes". The Tenth Circuit indicated as much, in dicta, in its decision in *Slattery* v. *Arapahoe Tribal Council, supra.* See also *Laramie* v. *Nicholson,* 487 F. 2d 315 (9th Cir. 1973).

However, the courts have been loath to interfere with tribal membership standards. In *Yellowbird* v. *Oglala Sioux Tribe of South Dakota, supra,* the court refused to entertain an equal protection attack on the Oglala Sioux membership standards, absent an allegation that these membership standards were not uniformly applied. We submit that the Tenth Circuit, in *Slattery,* had the same principle in mind and, it appears quite clear that Judge Mechem, in deciding this case at the trial level, came to the same conclusion. It is important to note that the court in *Yellowbird* equated the contested membership standards with the blood quantum office-holding standards upheld in *Daly,* by characterizing both as internal tribal matters. Both *Yellowbird* and *Daly* are completely consistent with *Groundhog* v. *Keeler, supra.*

Membership in an Indian tribe is a question uniquely involving Indian culture. There is a no non-Indian equivalent. It cannot be equated with western world citizenship standards. Neither can it be equated with membership in a private organization such as a fraternity, sorority, country club or Elks club. As Judge Mechem so aptly observed in his superb analysis at trial level (402 F. Supp. 5) the tribal membership standards of Santa Clara Pueblo are the result of the cultural pattern developed by the pueblo. Likewise,

membership standards developed by other pueblos and tribes result from cultural patterns developed by those pueblos and tribes. The affidavits of tribal officials and the comprehensive report of Dr. Florence Ellis are attached to our brief in support of the Petition for Writ of Certiorari in this case, and the references set forth in the brief of amici curiae Seneca Nation and Association of American Indian Affairs, Inc. in support of such petition, show the great divergence of membership standards based on differing cultural norms. If the Federal Courts engage in establishing their own norms by which tribal membership standards were to be judged, they will indeed be substituting inbred non-Indian value judgments for tribal cultural value judgments developed and molded over years or centuries of close-knit living to fit a particular cultural context.

Under the interpretation that assumes jurisdiction, a Federal Court would, theoretically, entertain an equal protection case involving a tribal membership dispute. A clear deviation by a tribe from its own standards would be subject to judicial inquiry and remedy. If a tribe establishes a standard, ignores the standard and uses membership denial as a political or social weapon against a particular person within the class subject to the standards, a Federal Court would have the authority under the ICRA to step into the breach to insure equal protection. However, the standard against which ICRA equal protection must be measured is a tribal standard, not a standard imposed by the Federal judiciary.

The trial court found that the Santa Clara membership ordinance of 1939 was applied uniformly. Once

having reached this point, he considered the standard itself to be immune from non-Indian value judgments, i.e., he considered the standard to be a matter of tribal decision, not for decision by the court. This decision was clearly correct and must, we submit, be reaffirmed by this court.

Point Three

THE TRIBAL AUTHORITY OVER MEMBERSHIP IS A RESERVED POWER NOT TO BE OVERTURNED BY IMPLIED APPLICATION OF NON-INDIAN EQUAL PROTECTION NORMS.

Felix S. Cohen stated the general rule as to the powers of Indian tribes in a clear, concise manner, as early as 1934:

> "Perhaps the most basic principle of all Indian law, supported by a host of decisions . . ., is the principle *that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*
>
> Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive context. What is not expressly limited remains within the domain of tribal sovereignty, and therefore falls within the statutory category, 'powers vested in any Indian tribe or tribal council by existing law.'"

> *United States Department of the Interior, Office of the Solicitor, Solicitor's Opinion M-22781, POWERS OF INDIAN TRIBES (1934); emphasis in the original).*

Cohen is supported by numerous decisions. For example, see *Worchester* v. *Georgia, supra; Cherokee Nation* v. *Georgia, supra; United States* v. *Winans,* 198 U.S. 371 (1905), and *United States* v. *Washington,* 384 F. Supp. 312, 407 (W.D. Wash. 1974). Under this analysis, the membership ordinance of Santa Clara Pueblo, and the membership standards developed by other Indian governments must be upheld unless it can be shown that Congress has pre-empted Indian tribal sovereignty in the determination of membership questions. The tribal power to determine questions of membership inheres in tribal sovereignty and has been beyond dispute for more than a century and a half. *Cherokee Nation* v. *Georgia, supra.* Moreover, the tribes may qualify the rights of membership, at least as to "naturalized" persons. *Cherokee Intermarriage Cases,* 203 U.S. 76 (1906). Tribes may revoke membership, *Roff* v. *Burney,* 168 U.S. 218 (1897), and make rules governing recognition and adoption, *Smith* v. *Bonifer,* 154 F. 883 (D.C. Ore. 1907). Thus, up to the adoption of the ICRA, Indians continued to exercise the power to choose tribal membership and other membership questions. The question is, therefore: Did Congress, in enacting the ICRA, preempt this power?

Neither the statute as enacted, its legislative history, nor the cases decided under it prior to the Tenth Circuit decision below lend credence to the view that Congress in enacting the ICRA intended to preempt the

membership power. *1968 U.S. Cong. and Adm. News,* p. 1837. On the contrary, the decided cases speak consistently of the deference to be paid Indian culture and autonomy. *O'Neal* v. *Cheyenne River Sioux Tribe, supra.*

The very object of the ICRA is to avoid threatening fundamental tribal interests. *McCurdy* v. *Steele,* 353 F. Supp. 629 (D.C. Utah 1973). The right of a tribe to choose its own membership has been considered fundamental from the very outset of federal-Indian relations. *Cherokee Nation* v. *Georgia, supra.* In the words of the trial court, if tribal sovereignty means anything, it means a tribe has the power to choose its own members.

There is a close analogy here to the power of the Congress of the United States over immigration and naturalization. The legislative power of Congress over the admission of aliens is complete. *Kleindienst* v. *Mandel,* 408 U.S. 753 (1972); *Matthews* v. *Diab,* 426 U.S. 67 (1976). Congress can legislate immigration and naturalization standards which discriminate against certain children or parents of United States citizens based on sex and illegitimacy. *Faillo, et al.* v. *Bell,* No. 75-6297, Sup. Ct., 45 Law Week 4402, decided April 26, 1977, affirming *Faillo* v. *Levi,* 406 F. Supp. 162 (E.D.N.Y. 1975). This court has held that with respect to immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens. *Matthews* v. *Diaz, supra,* at page 80. Why then, cannot an Indian tribe, exercising its powers of self-government, prescribe rules which might be unacceptable to the general citizenry in the non-Indian context?

Point Four

THE TENTH CIRCUIT APPLIED AN IMPROPER EQUAL PROTECTION STANDARD TO THE 1939 SANTA CLARA ORDINANCE.

Not only did the Tenth Circuit erroneously apply standard Fourteenth Amendment principles to the Santa Clara Ordinance, but it went one step farther. It adopted a strict compelling interest test not yet applied by this court in non-Indian gender-based discrimination cases. Indeed the majority of this court has never accepted compelling interest to test such discrimination. To the contrary, this court has consistently applied a test which states that the rule being attacked must serve important governmental objectives and be substantially related to the achievement of those objectives. *Craig* v. *Boren,* —— U.S. ——, 50 L. ed. 2d 397 (1976); *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); *Geduldig* v. *Aiello,* 417 U.S. 484 (1974); *Kahn* v. *Shevin,* 416 U.S. 351 (1974); *Reed* v. *Reed,* 404 U.S. 71 (1971).

The trial court found essentially, that the 1939 Santa Clara Ordinance met the standard set forth in these cases.

It is inconceivable that the Pueblo of Santa Clara, and other Indian tribes, with traditions foreign to anglo-saxon norms, must, according to the Tenth Circuit, have their membership standards based on sex judged by a standard which this court has chosen not to impose on the majority population inbred with standards which are foreign to the traditional Indian context.

III.

CONCLUSION

The Amici Curiae respectfully submit that this court order a dismissal of this case for lack of jurisdiction or, in the alternative, order the decision below be reversed and the decision of the trial court be reinstated.

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Supreme Court, U. S.
FILED
AUG 26 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-682

SANTA CLARA PUEBLO, *et al.*,

Petitioners,

—v.—

JULIA MARTINEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION

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BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION

INTEREST OF AMICUS*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members. The ACLU is dedicated to defending civil liberties, particularly those guaranteed by the Bill of Rights.

The ACLU has a particular interest in the resolution of this case. ACLU Policy No. 313, adopted by the National Board of Directors, recognizes that "American Indian people and their tribes occupy a unique position in American society. Throughout the history of this country, Indian People have maintained cultural and religious identities distinct from those of all other peoples.' On the other hand, "the ACLU firmly supports the right of all individuals to be free from governmental abuse of power, whether the offending government be federal, state, or tribal" (Policy No. 313). That policy, and this case, require "thoughtful investigation of the countervailing interests" (id.).

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* Counsel for Petitioners and Respondents have both consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the court pursuant to Rule 42(2) of the Rules of this Court.

The ACLU is thus sensitive to the interests of Indian tribes, and also to the interests of individual tribal members. That sensitivity is reflected in this amicus brief, which we believe will be of assistance to the Court.

SUMMARY OF ARGUMENT

The legislative history of the Indian Civil Rights Act shows that Congress intended to limit tribal authority and to confer upon individual Indians substantially all of the rights contained in the United States Constitution. Those rights are enforceable in federal district courts in both civil and criminal contexts, and the Act waives tribal sovereign immunity with respect to claims made pursuant to the Act. Point I.

Although the Indian Civil Rights Act must be applied with great sensitivity to tribal customs and institutions, on the facts of this case, the tribal interests are neither sufficiently clear nor sufficiently substantial to justify the clear and substantial abridgment of respondents' constitutional and statutory rights, especially since there are less drastic means by which Petitioners can accomplish their legitimate objectives. Point II.

I. THE INDIAN CIVIL RIGHTS ACT WAIVES THE SOVEREIGN IMMUNITY OF INDIAN TRIBES AND CONFERS JURISDICTION UPON FEDERAL COURTS IN MATTERS OF TRIBAL MEMBERSHIP

The historical background, the congressional intent and the plain statutory language of the Indian Civil Rights Act of 1968, 25 U.S.C. §§1301 et seq. (ICRA), demonstrate that the Act waives the sovereign immunity of Indian tribes and confers jurisdiction upon federal courts in a broad range of disputes, including disputes about tribal membership. In fact, the central purpose of the ICRA was to place substantial restrictions on the absolute powers of tribal governments in both civil and criminal contexts.

A. Historical Background

The ICRA should be considered in historical perspective. In 1832, Chief Justice Marshall, speaking for the Court, described Indian Tribes as "distinct political communities, having territorial boundaries, within which their authority is exclusive...[and] in which the laws of [the state] can have no force." Worcester v. Georgia , 31 U.S. 515, 557, 559 (1832). Thus was born the "general notion" of "tribal sovereignty." Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962).

The Worcester formulation of inherent tribal sovereignty, under which tribal authority was deemed "exclusive" within the reservation, "has by no means

remained constant." Kake, supra at 71. Over the years, "[t]ribal sovereignty, it is apparent, has been severely limited by congressional[1] and administrative action"[2] and by the action of this Court as well.[3] The trend today "has been away from the idea of inherent Indian sovereignty...and toward reliance on federal pre-emption," McClanahan v. Arizona State Tax Comm'n, 411 U.S. 160, 172 (1973), to determine the extent of tribal authority.

The original formulation of tribal sovereignty, however, had at least one very profound effect: the provisions of the Constitution were held inapplicable

1 See e.g., the Major Crimes Act, 23 Stat. 385, as amended, 18 U.S.C. §1153 (1885); the General Allotment Act, 24 Stat. 388, as amended, 25 U.S.C. §348 (1887); 45 Stat. 1185, as amended, 25 U.S.C. §231 (1929); Pub. L. 280, 67 Stat. 588, as amended, 28 U.S.C. §1360 (1953).

2 SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS BY THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, "Constitutional Rights of the American Indian, " 89 Cong., 2d Sess. (1966) at 3 (hereinafter, "Summary Report").

3 See, e.g., United States v. McBratney, 104 U.S. 621 (1881); United States v. Sandoval , 231 U.S. 28 (1913); Puyallup Tribe, Inc. v. Dept. of Game of Washington, ___ U.S. ___, 97 S. Ct. 2616 (1977).

to the exercise of a tribe's powers over its members. Talton v. Mayes, 163 U.S. 376 (1896). A judicially-created doctrine of sovereign immunity exempted tribal governments from constitutional restraints, and tribal members who sought federal judicial relief from tribal abuse were consistently denied access to the courts.[4] See, e.g., Native American Church v. Navajo Tribal Council, 272 F. 2d 131 (10th Cir. 1959) (tribe not bound by First Amendment's Free Exercise of Religion Clause); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F. 2d 529 (8th Cir. 1967) (tribe not bound by Fourteenth Amendment's Equal Protection and Due Process Clauses).

B. Legislative History

In 1961, a Senate Subcommittee began hearings to investigate the constitutional rights of American Indians.[5] Those

4 The sole exception is Colliflower v. Garland, 342 F. 2d 369 (9th Cir. 1965). In Colliflower, the Ninth Circuit imposed constitutional restraints on a tribal court which had such close affiliations with the federal government that it was deemed to be a federal instrumentality.

5 See, Hearings on Constitutional Rights of American Indians Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961) (hereinafter "Hearings").

hearings, held intermittently through 1968,[6] revealed the extent to which the acts of tribal governments were inconsistent with constitutional principles.

Senators on the Subcommittee were "shocked"[7] and "astounded"[8] to learn

6 For further discussion of the Senate hearings and legislative history of the ICRA, see Note, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," 82 Harv. L. Rev. 1343, 1355-1360 (1969); Burnett, "An Historical Analysis of the 1968 'Indian Civil Rights' Act", 9 Harv. J. Leg. 557,574-614 (1971-72) (hereinafter, "Note" and "Burnett", respectively).

7 Testimony of Senator Hruska of Nebraska, Cong. Rec., 1st Sess., p. 35473 (Dec. 7, 1967):

"Mr. Hruska: Mr. President...As the hearings developed and as the evidence and testimony were taken, I believe all of us who were students of the law were jarred and shocked by the conditions as far as constitutional rights for members of the Indian tribes were concerned. There was found to be unchecked and unlimited authority over many facets of Indian rights. There was a failure to conform to many of the elemental and traditional constitutional safeguards. The Constitution simply was not applicable."

8 Testimony of Senator Ervin of North

(FN 8 Continued on Next Page)

that tribal powers were unchecked by constitutional restraints. Chairperson Ervin described reservation Indians as languishing "in a legal no -man's land."[9] Senator Hruska deplored the fact that tribal governments wielded "unlimited authority over many facets of Indian rights,"[10] and Congressional laxity with respect to those matters was called a "dereliction."[11]

(FN 8 Continued)
Carolina, Cong. Rec., 90th Cong., 1st Sess., p. 35473 (December 7, 1967):

"Mr. Ervin: Mr. President...When the Subcommittee on Constitutional Rights began its study of this problem most of its members were astounded to learn that under decisions of the courts, reservation Indians do not possess the same constitutional rights which are conferred upon all other Americans by the Bill of Rights and the Constitution."

9 Cong. Rec., 90th Cong., 1st Sess., p. 35472 (Dec. 7, 1967).

10 Cong. Rec., supra, n. 7.

11 Testimony of Senator Hruska of Nebraska, Cong. Rec., 90th Cong., 1st Sess., p. 35473 (Dec. 7, 1967):

"Mr. Hruska: Mr. President...In [S. 1843, the bill which was to become the ICRA] we have a very splendid document which will protect the rights of the American Indians in many ways and bring
(FN 11 Continued on Next Page)

The Subcommittee was primarily concerned with criminal trial procedures in tribal courts,[12] but that was not its sole concern. The Subcommittee's Report of 1966 specifically noted that "[i]t is not only in the operation of tribal courts that Indians enjoy something other than full benefits of the Bill of Rights."[13] The Report specifically cited the freedom of religion case of Native American Church, supra, as "instructive in pointing up the lack of remedies available to the Indian in resolving his differences with tribal officials."[14]

The Subcommittee was deeply concerned about the absence of constitutional restrictions in both civil and criminal matters. Senator Ervin's initial legislative proposal would have imposed upon tribal governments all of the limitations contained in the Constitution.[15] That

(FN 11 Continued)
those rights up to date, which will reflect great credit on this Congress and, unfortunately, will reflect greatly upon the dereliction of some of our previous Congresses. However, we should look forward rather than lament the past in this regard."

12 See Note, supra n. 6, at 1359.

13 SUMMARY REPORT, supra n. 2, at 3.

14 Id., at 4.

15 See, Note, supra n. 6, at 1359; Burnett, supra n. 6, at 588-589.

proposal was later modified to delete those few constitutional provisions which were considered antithetical to continued tribal existence, such as the Fifteenth Amendment's prohibition against discrimination in voting on account of race, and, out of deference to theocratic tribes, the First Amendment's prohibition against the establishment of religion. Other than those few deletions,[16] the bill which was to become the ICRA [S.1843 as amended] was a statutory codification of all the liberties and protections contained in the Bill of Rights and in the Fourteenth Amendment. As the Committee Report which accompanied S.1843 made clear, "the purpose of S.1843, as amended, is to insure that the American Indian is afforded the broad constitutional rights secured to other Americans."[17] There is no suggestion in that accompanying Report that those "broad constitutional rights" were to apply only in tribal criminal proceedings; indeed, the contrary is evident.

16 There were only three other deletions: the right to appointed counsel in criminal proceedings, the right to indictment by a grand jury, and the right to a jury panel in civil cases. See Note, supra, n. 6, at 1359-1360; Burnett, supra, n.6, at 589-592.

17 REPORT OF THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, Senate Report No. 841, 90th Cong., 1st Sess. (1967), at 6.

C. Statutory Language

By far the most cogent demonstration of congressional intent lies in the plain language of the ICRA itself. The language of §1302 compels the conclusion that Congress intended to confer rights in both civil and criminal contexts, and that, consequently, the habeas corpus provision in §1303 was not intended to be the exclusive remedy for violation of the Act.

Section 1302 enumerates rights which can never be redressed by habeas corpus, such as the right to be compensated for the taking of private property (§1302 (5)). Tribal interference with religious activities, which was of particular concern to the Senate Subcommittee,[18] is rarely redressable by habeas corpus. The same is true for bills of attainder (§1302 (9)), see, e.g., United States v. Lovitt, 328 U.S. 303 (1946), and for many incursions on the freedoms of speech and press (§1302 (1)). See, e.g., Healy v. James, 408 U.S. 169 (1972); Elrod v. Burns, 427 U.S. 347 (1976); City of Madison, Joint School Dis. No. 8 v. Wis. Emp. Rel. Comm'n, ___ U.S. ___, 97 S. Ct. 421 (1977).

18 See notes 13-14 supra and accompanying text. "One issue which drew Subcommittee attention to the abuse of [tribal] council power was freedom of religion." Burnett, supra n. 6, at 582. The Subcommittee received testimony,

(FN 18 Continued on Next Page)

Quite obviously, then, Congress intended §1302 to act as a general waiver of tribal sovereign immunity with regard to the constitutional protections afforded by the Act.[19] "The Senate Committee expressed no intention to limit remedies to habeas corpus."[20] To hold that

(FN 18 Continued)

for example, that tribal members were being denied access to communal areas, and were being subjected to employment discrimination and police harassment solely because of their religious affiliations. See Hearings, supra n. 5, at 98, 467-478.

19 The fact that the IRCA does not explicitly waive sovereign immunity is irrelevant. "The underlying premise is that congressional intent will control. DeCoteau v. District County Court, 420 U.S. [425], 444, 449 [1975]." Rosebud Sioux Tribe v. Kneip, ____ U.S. ____, 51 L. Ed. 2d 660, (1977). Congressional intent is very clear. See nn. 5-17 supra and accompanying text. Since respondents sought only injunctive and declaratory relief, the issue of tribal immunity from damages is not presented here. C.f., Edelman v. Jordan, 415 U.S. 651 (1974). With respect to the relief sought, however, jurisdiction over the tribe by and through its officers is obviously proper. Ex parte Young, 209 U.S. 123 (1908).

20 Note, supra n. 6, at 1371.

habeas corpus is the exclusive remedy afforded by the ICRA would mean, for example, that a tribal government's confiscation of political handbills would be immune from challenge so long as no arrest was made. That could hardly have been the intention of Congress in affording the "broad constitutional rights" of freedom of speech and press.

Given the plain language of the Act itself, and its historical and legislative background, it is not surprising that beginning with Luxon v. Rosebud Sioux Tribe, 455 F. 2d 698 (1972), federal courts have consistently held that 28 U.S.C. §1343(4) provides a logical and specific basis of federal court jurisdiction over civil disputes arising under the ICRA.[21] "[T]o hold otherwise would render the provisions of the Act unenforceable and an exercise in Congressional futility." Johnson v. Lower Elwha Tribal Community, 484 F. 2d 200, 203 (9th Cir. 1973); Dry Creek Lodge, Inc. v. United States, 515 F. 2d 926 (10th Cir. 1975). The ICRA obviously confers federal rights, and "the existence of all necessary and appropriate remedies" to enforce those rights is presumed. Sullivan v.

21 See, e.g., Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F. 2d 1231 (4th Cir. 1974); Johnson v. Lower Elwha Tribal Community, 484 F. 2d 200 (9th Cir. 1973); Dry Creek Lodge, Inc. v. United States, 515 F. 2d 926 (10th Cir. 1975).

Little Hunting Park, Inc., 396 U.S. 299, 239 (1969). It is therefore proper to imply a civil remedy under the ICRA. See, J.I. Case v. Borak, 377 U.S. 426, 433 (1964); Bell v. Hood, 327 U.S. 678, 684 (1946); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414 n. 13 (1968).

In short, the very enactment of the ICRA, over the strenous objection of some tribal governments,[22] demonstrates the Congressional intent that all citizens of the United States should enjoy the essential protections afforded by the Constitution. And as both the Ninth[23] and Tenth[24] Circuits have now

22 See, Burnett, supra n. 6, at 589-601. "Most of the tribes testifying...were sympathetic to the purposes of the legislation and amenable to the eventual merger of the Indian and non-Indian systems of justice." The most vociferous opposition came from the Pueblos, who "resisted measures which threatened their culture or the structure of their authority." Id., at 601.

23 Laramie v. Nicholson, 487 F. 2d 315 (9th Cir. 1973), cert. den. sub nom Tonasket v. Thompson, 419 U.S. 871 (1975).

24 Martinez v. Santa Clara Pueblo, 540 F. 2d 1039 (10th Cir. 1976), cert. granted _____ U.S. _____ (1977).

held, the constitutional rights guaranteed by the ICRA are applicable to disputes concerning tribal membership.

II. USING A STANDARD OF REVIEW APPROPRIATE TO EQUAL PROTECTION CLAIMS UNDER THE ICRA, PETITIONERS' ORDINANCE MUST BE INVALIDATED

As indicated above, the ICRA confers jurisdiction upon federal courts in a broad range of issues, including issues of tribal membership. It now remains to be considered: what standard of review is appropriate in such cases, and does the appropriate standard require the invalidation of the Pueblo ordinance at issue herein?

A. Standard of Review

There would be strong reasons to apply the same equal protection standard in ICRA cases as is applied in Fourteenth Amendment cases. The wording of the two equal protection provisions is virtually identical[25], and it has always been the

25 The Fourteenth Amendment requires that a state afford equal protection of "the" laws. The ICRA requires that a tribe afford equal protection of "its" laws. Petitioners have not claimed there is any significance in this distinction, and rightly so. The word "its"

(FN 25 Continued on Next Page)

rule that where Congress borrows terms of art "in which are accumulated the legal traditions and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word," unless Congress clearly indicates otherwise. Morissette v. United States, 342 U.S. 246, 263 (1952). See also, Huddleston v. United States, 415 U.S. 814 (1974).

On the other hand, the ICRA does show congressional sensitivity to tribal interests. The conscious deletion from the ICRA of constitutional provisions that were considered completely antithetical to tribal culture and autonomy suggests that tribal culture and autonomy are legitimate factors to be considered when applying the Act's equal protection clause.

(FN 25 Continued)
should not be interpreted literally, since to do so would authorize tribal inequality in the application of federal laws and would thus transform the ICRA from a statute which protects individual liberties into one which authorizes gross discrimination. For example, if a tribe decreed that all members of a certain religious group were prohibited from voting in tribal elections, and uniformly enforced that decree, it would afford equal protection of its laws, but quite obviously would turn the ICRA on its head. C.f., Loving v. Virginia, 388 U.S. 1, 8 (1967).

The fact remains, however, that §1302 of the Act, in which Congress confers substantially all of the rights previously denied to reservation Indians, is above all else a proclamation of individual liberties. The ICRA is first and foremost a Bill for Rights for individual Indians.

The Eighth Circuit described the twin goals of the ICRA--protecting individual rights while fostering tribal self-government--as "possibly conflicting." Wounded Head v. Tribal Council of Oglalla Sioux Tribe, 507 F. 2d 1079, 1082 (8th Cir. 1975). These goals are not just "possibly" conflicting; they are inherently conflicting. The same stroke of the pen which guaranteed rights to reservation Indians necessarily diminished tribal authority to the same extent. Although some portions of the ICRA may be said to foster tribal self-government,[26] §1302 does not.

What, then, is the appropriate standard of review in equal protection claims brought under §1302 of the ICRA?

26 See, e.g. §§1321-23 of the ICRA, which eliminates the ability of a State to assume jurisdiction over an Indian reservation without the tribe's consent, and permits a State to retrocede to the federal government any jurisdiction which it had previously assumed over an Indian reservation. See also §1331 regarding employment of legal counsel and §1311-12 regarding a model code to be used in Courts of Indian Offenses.

The appropriate standard of review, amicus suggests, is one which gives deference to tribal customs and institutions, but which gives paramount concern to the individual rights afforded by the Act. Stated differently, the standard of review under the ICRA should be identical to the Fourteenth Amendment standard with one major difference: the concept of Indian sovereignty serves as a "backdrop", McClanahan, supra, 411 U.S., at 172, against which the tribal action should be viewed. This standard would permit courts to consider tribal customs or traditions, as well as the tribe's interest in autonomy and self-government, in resolving equal protection claims under the ICRA. However, "[w]here very important personal rights are at stake...even important cultural values [of the tribe] would have to give way."[27] The decision to place the fundamental rights of the individual above the interests of the government is as apparent on the face of the ICRA as it is on the face of the Constitution and the Bill of Rights; it is the cornerstone of our form of government, and Congress has now extended those rights to reservation Indians.

The standard of review amicus suggests is in accord with the clear majority of court decisions dealing with this issue. Those decisions reflect sensitivity to tribal interests while

27 Note, supra n. 6, at 1369.

safeguarding basic constitutional rights of individuals. Consistent with that sensitivity, courts have required exhaustion of tribal remedies,[28] except where such exhaustion would threaten fundamental rights.[29] Similarly, although a tribal court may not be a court of record, its decisions may nevertheless narrow a vague penal statute; yet where the statute remains impermissably vague, the overriding interests of §1302 require the statute's invalidation.[30] A tribe is free to reject certain principles of Anglo law;[31] yet where the tribe has chosen to embrace those principles, their application can be reviewed according to traditional Fourteenth Amendment standards.[32]

28 O'Neal v. Cheyenne River Sioux Tribe, 482 F. 2d 1140 (8th Cir. 1973).

29 Means v. Wilson, 522 F. 2d 833 (8th Cir. 1975) cert. den. 424 U.S. 955 (1976); Brown v. United States, 486 F. 2d 658 (8th Cir. 1973).

30 Big Eagle v. Andera, 508 F. 2d 1293

31 Wounded Head v. Tribal Council of Oglalla Sioux Tribe, 507 F. 2d 1079 (8th Cir. 1975).

32 White Eagle v. One Feather, 478 F. 2d 1311 (8th Cir. 1973).

Accordingly, lower courts have shown sensitivity to tribal interests[33], but where fundamental or overriding constitutional rights are involved have held that even important tribal interests cannot prevail.[34]

In short, the proposed standard of review seeks to accomplish what Congress intended: protect the constitutional rights of individuals while remaining sensitive, where possible, to the interests of the tribe. Where tribal interests cannot be sustained without a violation of the Act, tribal interests must give way.[35]

33 Howlett v. Salish and Kootenai Tribes, 529 F. 2d 233 (9th Cir. 1976); Daly v. United States, 483 F. 2d 700 (8th Cir. 1973).

34 Johnson v. Lower Elwha Tribal Community, 484 F. 2d 200 (9th Cir. 1973); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F. 2d 1231 (4th Cir. 1974); Means v. Wilson, supra n. 29; Martinez v. Santa Clara Pueblo, 540 F. 2d 1039 (10th Cir. 1976), cert. granted ___ U.S. ___ (1977).

35 The standard of review proposed by amicus Confederated Tribes of the Colville Indian Reservation is in accord, albeit stated differently, with the one currently suggested. On page 20 of their brief, Confederated Tribes suggest the following standard:
(FN 35 Continued on Next Page)

B. The Ordinance Violates the ICRA

Employing the suggested standard of review, the Court should declare the Pueblo's membership ordinance invalid. The ordinance results in the loss of fundamental rights, and the tribe cannot satisfy its burden of justification.

The injuries suffered by respondents as a result of the ordinance are substantial and grievous.[36] If this ordinance is sustained, respondent Audrey Martinez will be denied membership in the tribe

(FN 35 Continued)
"A classification made by an Indian tribe will be overturned only when it clearly appears that it results in deprivation of individual liberty guaranteed by the Indian Civil Rights Act." Implicit in the Colville's formulation is the recognition that individual rights guaranteed by the ICRA are paramount to the interests of the tribe. The standard proposed by Petitioners, however, would place tribal interests above individual rights in all cases, imposing on tribes only the duty of applying tribal ordinances "with an even hand." Pet's Brief, at 27. That test would be inconsistent with Congressional intent, and would render the ICRA a futile gesture. See n. 25, supra.

36 For more complete discussion of these injuries, see the district court opinion below, 402 F. Supp., at 14-15 ,
(FN 36 Continued on Next Page)

and all the benefits that depend upon membership, including the right to continue to live on the land where she has lived all of her life, the right to use tribal lands for farming, recreation or other purposes, and the right to participate in the political life of the tribe. And she will be denied those benefits through no fault of her own, and for no reason within her power to control, but solely because of her ancestry. See Hernandez v. Texas, 347 U.S. 475 (1974); Martinez v. Santa Clara Pueblo, 540 F. 2d 1039 (10th Cir. 1976), cert. granted, _____ U.S. _____, 53 L. Ed. 2d 223 (1977).

The ordinance also substantially burdens marital privacy and personal autonomy. The ordinance says to respondent Julia Martinez (and to all other Santa Clara women): if you marry a Santa Clara male, your children will be tribal members and will enjoy tribal benefits; if you marry anyone else, your children will not be tribal members and will lose those important political and economic benefits. That the ordinance

(36 FN Continued)
and that of the court of appeals, 540 F. 2d, at 1047. The injuries suffered by respondents should be considered in the context of reservation life, because the loss of membership rights, federal benefits, treaty rights, etc. do not have an equivalent in Anglo society.

does not preserve cultural purity, but does penalize extra-tribal marriage, is emphasized by the fact that the illegitimate children of a Santa Clara woman and a non-Santa Clara male will be granted full membership rights; only the legitimate offspring of such a union are penalized. (Pet.'s Brief at 32). The ordinance provides strong political and economic pressure to coerce women, but not men, to marry within the tribe, thus burdening the woman's choice of a spouse, a choice which lies at the very core of the concepts of marital privacy and personal autonomy. See Loving v. Virginia, 388 U.S. 1 (1967), Griswold v. Connecticut, 381 U.S. 479 (1965).

Finally, and most obviously, the ordinance is sexually discriminatory and applies only to female Santa Clara members; male Santa Clara members may marry anyone they choose, and their children will be tribal members.

The ordinance thus discriminates on the basis of sex and ancestry, and substantially burdens marital privacy and personal autonomy. Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, _____ U.S. _____, 51 L. Ed. 2d 270 (1977). These injuries are particularly troubling because respondent Julia Martinez is a tribal member, and therefore has a right to expect more benign treatment.37

37 The district court found that Ms. Martinez's children "are, culturally, for
(FN 37 Continued on Next Page)

As one commentator prophetically noted in 1969:

> "[Classifications] would seem a different matter when membership restrictions...are used to distinguish among those with a stake in the tribe...When a tribe has allowed a non-member on the reservation or has allowed a member to return with a "diluted" offspring, and such person has lived all or most of his life with the tribe, to allow the tribe to impose lineage distinctions is not justified by the need to preserve the tribe's ethnic base. If the statute's guarantee of equal protection is intended to have any meaning outside the criminal context, it must bar such classifications."[38]

Due to the fundamental rights at stake--tribal enrollment, sexual equality, marital privacy, personal autonomy, and freedom from discrimination because of ancestry--the tribe must meet a heavy

(FN 37 Continued)
all practical purposes, Santa Clara Indians." 402 F. Supp., at 18. Therefore, they too are within the "cultural group" entitled to protection from invidious membership classifications. See, Note, supra n. 6, at 1362-1363.

38 Note, supra n. 6, at 1362.

burden of justification. Craig v. Boren, supra; Griswold v. Connecticut, supra; Loving v. Virginia, supra.

The tribe asserts that the 1939 ordinance is a direct codification of tribal tradition. That is a dubious assertion. Even the tribe's Constitution of 1935 provides for determination of membership in cases of mixed marriage without regard to sex,[39] and the district court specifically found that the ordinance is a "break with tradition."[40] 402 F. Supp. at 16.

But even assuming the presence of a tribal tradition, individual rights guaranteed by the ICRA cannot be denied by the mere assertion of a "tribal tradition." It was precisely the harm caused by tribal traditions which prompted the

39 Const. and Bylaws of the Pueblos of Santa Clara of New Mexico, Art. II, Sec. 1 (c), appendixed to Pet.'s Brief, at 2.

40 The trial record reveals that, historically, membership in cases of mixed marriage was dealt with on a case by case basis. 402 F. Supp. at 16; 540 F. 2d at 1047.

enactment of the ICRA. Nor is it dispositive, as petitioner claims,[41] that the ordinance is "evenly applied;" denying everyone in a class the rights to which they are entitled does not validate an invidious classification. Craig v. Boren, supra; Loving v. Virginia, supra.

The tribal tradition may serve as a "backdrop;" but so, too, must the Fourteenth Amendment. We must consider whether the ordinance is substantially related to the tribe's legitimate interests and whether less restrictive means are available to protect those interests. Craig v. Boren, supra; Shapiro v. Thompson, 394 U.S. 618 (1969); Sugarman v. Dougall, 413 U.S. 634 (1973).

The irony of this case is that the tribal ordinance is not substantially related to the tribe's legitimate interests; in fact, it is antithetical to the interest advanced by the tribe. The tribe seeks to keep itself culturally pure. We will assume that is a legitimate interest. The 1939 ordinance was asserted to be the main bulwark between the Pueblo and persons "who would come in from all directions." Testimony of Gov. Tafoya, R.P. 117 (Pet.'s Brief, at 28). But the 1939 ordinance bestows automatic membership on persons who may have no ties, either to the tribe or to the reservation, other than having been

41 See Pet.'s Brief, at 25-27.

born to a male tribal member, while it excludes from membership persons with Santa Clara blood who have lived all their lives on the reservation and who are steeped in tribal culture. Cultural purity would be protected more by membership requirements of residence and blood quantum than by the ordinance at issue.

The Pueblo has an insubstantial cultural and historical interest in maintaining the 1939 ordinance. In fact, as the district court noted, the ordinance may well be destructive of the Pueblo's interests, 402 F. Supp. at 18.

The court of appeals held that the ordinance was neither logically related to the cultural survival of the Pueblo nor supported by tribal history, and characterized the ordinance as an arbitrary solution, of recent origin, to what was essentially an economic problem. 540 F. 2d at 1046-1048. The record supports those conclusions.

Even if the tribal interests were substantial, the following drastic alternatives would satisfy the tribal interests regarding the cultural purity of children of mixed marriages, without violating the equal protection clause: (a) allow all such children to be members; (b) allow none of such children to be members; (c) allow only those children who meet a certain blood quantum to be members; (d) allow only those children who meet both a blood quantum and a

residence requirement to be members; (e) allow only those children who demonstrate a certain level of cultural awareness to be members. The ultimate decisions with respect to the adoption of these alternatives must be left with the tribe. Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F. 2d 1231 (4th Cir. 1974). But the availability of such alternatives undermines the claims of tribal necessity for the challenged ordinance.

In short, this case involves precisely the type of discrimination against tribal members the ICRA was designed to eliminate.[42] The tribal interest advanced to support that discrimination is recent, insubstantial, and capable of satisfaction by less drastic means. Accordingly, that ordinance violates the ICRA. "[T]o hold otherwise would render the provisions of the Act unenforceable and an exercise in Congressional futility." Crowe, supra at 1234.

---

42 See Note, supra n. 6 at 1362-63; see also n. 38 supra, and accompanying text. Instances of discrimination with respect to enrollment are not limited to the instant tribe. This amicus is presently litigating the case of Pilcher v. Sac and Fox of Missouri Tribe, Civ. No. 77-4023 (D. Kan., filed Feb. 14, 1977). In that case, the uncontroverted evidence shows that a tribe accepted the enrollment applications of two brothers and simultaneously denied an identical
(FN 42 Continued on Next Page)

CONCLUSION

For the reasons set forth herein, the decision below should be affirmed.

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August 1977

(FN 42 Continued)
application from a third brother. It is alleged in that case that the tribe's decision was based solely on ill-feelings harbored by the tribal chairman against the applicant.

No. 76-682

In the Supreme Court of the United States

OCTOBER TERM, 1977

SANTA CLARA PUEBLO, ET AL., PETITIONERS

v.

JULIA MARTINEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-682

SANTA CLARA PUEBLO, ET AL., PETITIONERS

v.

JULIA MARTINEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States occupies a unique and important position with respect to the Indian tribes within its borders and the members of those tribes. As this Court has long recognized, the United States has primary responsibility for the protection of the Indian tribes, United States Constitution, Art. I, Sec. 8, cl. 3, and has assumed a relationship towards them similar to that of a guardian. See *Cherokee Nation* v. *Georgia,* 5 Pet. 1; *Worcester* v. *Georgia,* 6 Pet. 515; *United States* v. *Kagama,* 118 U.S. 375. Thus, any question concerning the powers or obligations of Indian tribes, or the

rights of individual Indians with respect to those tribes, is of substantial concern to the United States. Moreover, the Civil Rights Division of the Department of Justice has principal responsibility for enforcement of the Indian Civil Rights Act. 28 C.F.R. 0.50(a).

The Court invited expression of the views of the United States in this case when the petition for a writ of certiorari was pending. In its memorandum the United States stressed the importance of both the jurisdictional and substantive issues and recommended that the petition be granted (p. 9). We said that if the petition were granted, "the United States will file an *amicus curiae* brief addressing these questions on the merits" (*ibid.*). We now do so.

STATUTES INVOLVED

Sections 1301–1303 of Title 25 of the United States Code, the Indian Civil Rights Act of 1968, Title II, 82 Stat. 77–78, provide as follows:

§ 1301. Definitions

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies,

and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses

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in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

STATEMENT

1. Respondents filed this class action for declaratory and injunctive relief in the United States District Court for the District of New Mexico, challenging on equal protection grounds under the Indian Civil Rights Act (25 U.S.C. 1302(8)) an ordinance of the Santa Clara Pueblo that denies tribal membership to the children of Pueblo women, but not of Pueblo men, who marry outside the tribe. Respondent

Julia Martinez, a member of the Pueblo, is married to Myles Martinez, a full-blooded Navajo Indian who is not a Pueblo member (Pet. App. 13a).[1] They have lived on the Pueblo since their marriage in 1941 (*id.* at 17a, 30a–31a). Respondent Audrey Martinez is one of their eight children (*id.* at 13a), who has lived on the Pueblo all her life except for a brief absence for schooling (*id.* at 17a).

Petitioner Santa Clara Pueblo is an Indian tribe that has organized and adopted a constitution and by-laws pursuant to the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. 476 (*id.* at 15a).[2] The tribe occupies a reservation of 48,000 acres near Sante Fe, New Mexico, on which approximately 1,200 members and 150 to 200 non-members reside (*id.* at 14a). About 150 members reside elsewhere, one-third of them at other locations in New Mexico and the rest scattered through twenty-two other states (*ibid.*).

Petitioner Lucario Padilla is the Governor of the Pueblo. He is the executive head of the Pueblo's government and is responsible for enforcing its laws (*id.* at 13a; A. 5). He is also a member of the Pueblo Council, in which legislative and judicial authority is vested (Pet. App. 15a; A. 3–5). Other members of the Council include the Lieutenant Governor, the Secretary, the Treasurer, the Interpreter, the Sheriff, and eight representatives (Pet. App. 15a; A. 8–10).

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[1] "Pet. App." refers to the Appendix to the petition for a writ of certiorari.

[2] The Pueblo's constitution and by-laws appear in the Appendix filed in this Court (hereinafter "A".), at 1–15.

Under the Pueblo constitution, adopted in 1935 (Pet. App. 15a), the Council has authority to determine which children of marriages between members and non-members will be recognized as Pueblo members (Pet. App. 16a).[3] Before 1939 relatively few Pueblo members married outside the tribe, and the Council considered the membership status of each child of a mixed marriage individually (*id.* at 21a). In several instances the Council granted membership to children of mixed marriages in which the wife was the Santa Claran (*id.* at 30a, 44a). In the late 1930s, however, the number of Pueblo members who married outside the tribe markedly increased. Concern grew that the resulting increase in the population of the Pueblo would strain its limited economic resources (*id.* at 20a), and to alleviate this strain the Council on December 15, 1939, passed the following ordinance (Pet. App. 16a, 29a–30a; A. 18):

> Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:
>
> 1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
>
> 2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
>
> 3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
>
> 4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.[4]

The record indicates that the ordinance has been applied uniformly to deny membership to children, like the Martinez children, of marriages between women Pueblo members and non-members of the Pueblo (Pet. App. 9a, 18a).

Pueblo members possess certain rights not afforded non-members. They have the right to vote in tribal elections, the right to hold tribal office, and certain land use rights, including the right to pass use of land to succeeding generations (Pet. App. 17a).[5] Non-members such as the Martinez children, while denied these rights, are allowed to participate in the Pueblo's religious activities and are eligible to receive federal benefits afforded to Indians generally (*id.* at 18a).

The Martinez children live on the tribe's reservation, speak its language (Tewa), and participate in its

[3] The authority evidently derives from the legislative powers granted to the Council by Article IV, Section 1, of the constitution (A. 3–4) and from Article II, Section 1(c), which provides (A. 2) that the membership of the Pueblo shall include: "All children of mixed marriages between members of the Santa Clara pueblo and non-members, provided such children have been recognized and adopted by the council."

[4] Respondents attack parts 2 and 3 of the ordinance (Pet. App. 13a).

[5] Pursuant to an Act of Congress in 1858, the Pueblo holds all of the land within its boundaries in fee simple. Members have possessory interests in tracts of land which they may pass on to their descendants (*id.* at 31a n. 3).

religious ceremonies (*id.* at 25a–26a, 30a–31a). Since 1946 respondent Julia Martinez has sought unsuccessfully to have them enrolled as members of the Pueblo. After exhausting all available remedies within the Pueblo (*id.* at 10a–11a), she and her daughter filed this action, claiming that the ordinance violated the equal protection clause of the Indian Civil Rights Act, 25 U.S.C. 1302(8).

2. The district court upheld the ordinance. Rejecting petitioners' contention that it lacked jurisdiction over the action, the court held (Pet. App. 1a–11a) that 25 U.S.C. 1302(8) and 28 U.S.C. 1343(4) conferred jurisdiction over cases challenging tribal membership determinations on equal protection grounds (*id.* at 2a–8a); that the case presented a justiciable controversy (*id.* at 8a–9a); and that respondents had exhausted all tribal remedies (*id.* at 10a–11a). On the merits, the court stated that "the equal protection guarantee of the Indian Civil Rights Act is not identical to the constitutional guarantee of equal protection" (*id.* at 23a) and "should not be construed in a manner that would invalidate a tribal membership ordinance when the classification attacked is one based on criteria that have been traditionally employed by the tribe in considering membership questions" (*id.* at 25a). Although the court acknowledged that before 1939 the membership status of the children of mixed marriages was determined on a case-by-case basis (*id.* at 21a), it concluded that in view of the "traditionally patrilineal and patrilocal" nature of Pueblo society, the membership ordinance was sufficiently "rooted in certain traditional values" (*ibid.*).

3. The court of appeals reversed. Agreeing that the district court had jurisdiction over the claim and that sovereign immunity did not bar relief (*id.* at 32a–33a), the court ruled that while Fourteenth Amendment equal protection standards "do not * * * apply with full force," they do "serve as a persuasive guide" to construction of the equal protection clause of the Indian Civil Rights Act (*id.* at 42a–43a). Although the court suggested that the Pueblo's interest in "tribal, cultural and ethnic survival" might under some circumstances justify a discrimination that would be impermissible under the Fourteenth Amendment (*id.* at 43a), it found that, contrary to the conclusion of the district court, the membership ordinance was "the product of economics and pragmatics" and "historically * * * cannot be said to represent the Santa Clara tradition" (*id.* at 44a).[6] The court concluded that "[i]f the equal protection clause of the [Indian Civil Rights Act] is to have any consequence, it must operate to ban invidious discrimination of the kind present in this case" (*id.* at 44a).

[6] The court observed (*id.* at 45a):

"The instant tribe policy is of relatively recent origin and so it does not merit the force that would be attributable to a venerable tradition. Also, inasmuch as it originates from practical economic considerations, it becomes an arbitrary and expedient solution to the problem which was then confronting the Tribe."

INTRODUCTION AND SUMMARY OF ARGUMENT

The provisions of the United States Constitution protecting individual rights against actions of the Federal and State governments have been considered not to apply to the actions of Indian tribes. *Talton* v. *Mayes,* 163 U.S. 376; *Native American Church* v. *Navajo Tribal Council,* 272 F. 2d 131 (C.A. 10); see also *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation,* 259 F. 2d 553 (C.A. 8). But see *Colliflower* v. *Garland,* 342 F. 2d 369 (C.A. 9). As Indian tribes increasingly asserted powers of self-government that were reaffirmed in the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461 *et seq.,* Congress deemed it advisable to impose certain limitations on their authority through the Indian Civil Rights Act of 1968, Title II, 82 Stat. 77–78; now codified as 25 U.S.C. 1301–1303. That Act enumerates certain specific rights that tribal governments may not abridge, and authorizes *habeas corpus* actions in federal court "to test the legality of * * * detention by order of an Indian tribe" (25 U.S.C. 1303).[7] Section 1302(8) of the Act provides that "[n]o Indian tribe in exercising powers of self-government shall * * * deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

At issue here is an ordinance of the Santa Clara Pueblo denying tribal membership to children of

[7] Of the Act's ten provisions setting forth specific rights (25 U.S.C. 1302(1)–(10)), six may be described as primarily concerned with criminal procedure.

Pueblo women, but not of Pueblo men, who marry nonmembers of the tribe. We believe that the equal protection clause of the Indian Civil Rights Act allows tribes to make legislative distinctions that would be impermissible under the Fourteenth Amendment, if these distinctions can be justified by the need to preserve important and legitimate tribal interests. But we do not believe that the record in this case justifies, under the equal protection standards that we think should govern interpretation of the Act, the discrimination practiced on respondents. Moreover, we believe that respondents may seek declaratory and injunctive relief against that discrimination in federal court. We submit, therefore, that the judgment of the court of appeals should be affirmed.

I.

The threshold question is whether federal district courts have jurisdiction to grant declaratory and injunctive relief in cases arising under the Indian Civil Rights Act. Under 28 U.S.C. 1343(4), the district courts "have original jurisdiction of any civil action authorized by law to be commenced by any person * * * [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." While the Indian Civil Rights Act does not expressly authorize the filing of civil actions to effectuate its terms, its prohibitions against specified tribal actions create clearly defined federal rights and imply the availability of judicial relief necessary

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to protect those rights. Habeas corpus actions under Section 203 of the Act, 25 U.S.C. 1303, while providing an effective remedy against deprivation of rights in most criminal cases, cannot provide adequate redress for loss of rights in noncustodial situations. A private right of action for declaratory and injunctive relief is therefore a necessary complement.

This Court has recognized implied rights of action under analogous civil rights statutes (*e.g.*, 42 U.S.C. 1973c, 42 U.S.C. 1981, and 42 U.S.C. 1982), as well as in other contexts where such judicial enforcement is necessary to carry out the congressional purpose. *Allen* v. *State Board of Elections*, 393 U.S. 544; *Johnson* v. *Railway Express Agency*, 421 U.S. 454; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409. "The fact that [a statute] is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy." *Jones* v. *Alfred H. Mayer Co.*, *supra*, 392 U.S. at 414, n. 13.

We recognize that Indian tribes enjoy sovereign immunity from suit unless that immunity has been expressly waived. *Puyallup Tribe, Inc.* v. *Department of Game of Washington*, No. 76–423, decided June 23, 1977, slip op. 7; *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512. Although the explicit prohibitions imposed on tribal authority by the Indian Civil Rights Act may be sufficient to override tribal immunity, at least for purposes of declaratory and injunctive relief, we believe that in any event respondents can seek such relief against the Governor

of the Pueblo, also named as a defendant. Tribal officials are not shielded by tribal immunity when they seek to enforce tribal laws that conflict with the superior authority of federal law. See *Ex parte Young*, 209 U.S. 123. Nor are tribal membership decisions any longer exempt from scrutiny after passage of the Indian Civil Rights Act, which applies to "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed * * *." 25 U.S.C. 1301(2).

II.

The Indian Civil Rights Act, while imposing certain non-Indian values on Indian tribes, nonetheless contemplates their continued existence as "unique aggregations possessing attributes of sovereignty over both their members and their territory" (*United States* v. *Mazurie*, 419 U.S. 544, 557). It is not necessarily true, therefore, that classifications forbidden in non-Indian society must be struck down in the context of tribal society. Peculiarly Indian interests may justify such classifications where non-Indian interests could not. Indian interests must always be regarded as a relevant factor in assessing tribal legislation under the equal protection clause of the Act.

In the present case, however, we find no tribal interests sufficient to justify the discrimination embodied in the 1939 ordinance. Although petitioners claim the discrimination is necessary for the preservation of Pueblo culture, the ordinance is not substan-

tially related to the achievement of that important objective. It excludes from membership persons like the Martinez children who are culturally Santa Clarans and live at the Pueblo, while affording membership to persons who may have no ties with the Pueblo culture and live far away from the Pueblo. Nor can the ordinance be explained as the embodiment of a long-standing Pueblo custom or tradition; rather, it was enacted to solve an economic problem facing the Pueblo in 1939. Because other solutions are available that do not involve such invidious discrimination, the ordinance cannot stand.

ARGUMENT

I.

FEDERAL COURTS HAVE JURISDICTION TO GRANT DECLARATORY AND INJUNCTIVE RELIEF AGAINST OFFICIALS OF INDIAN TRIBES UNDER THE INDIAN CIVIL RIGHTS ACT

A. An important threshold question is whether the federal district courts have jurisdiction to give declaratory and injunctive relief[8] in a suit brought pursuant to the Indian Civil Rights Act. Under 28 U.S.C. 1343(4), the district courts have "original jurisdiction of any civil action authorized by law to be commenced by any person * * * [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." As the Indian Civil Rights Act

[8] Respondents did not seek damages, and the question whether the Act authorizes suits for damages against tribes and tribal officials is not presented in this case.

plainly is an "Act of Congress providing for the protection of civil rights," the pertinent inquiry is whether the Act authorizes civil actions for such relief.

The Indian Civil Rights Act does not expressly grant or deny authorization for private persons to seek declaratory or injunctive relief for violations of the Act. The Act does provide, however, that "[n]o Indian tribe in exercising powers of self-government shall" deny certain enumerated rights, including the right to equal protection of its laws. 25 U.S.C. 1302. The phrase "powers of self-government" is broadly defined to include "all governmental powers possessed by an Indian tribe." 25 U.S.C. 1301(2). The Act was expansive in concept and execution, designed "to insure that the American Indian is afforded the broad constitutional rights secured to other Americans."[9]

Despite the Act's broad language and purpose, it expressly provides federal jurisdiction only for *habeas corpus* actions (25 U.S.C. 1303), a remedy that petitioners regard (Br. 16) as exclusive. Were this so, however, the guarantees of the Indian Civil Rights Act would have meaning only for persons in the custody of an Indian tribe. Because numerous important rights guaranteed by the Act (including freedom of religion, freedom of speech, and just compensation for the taking of property) can seldom be protected in a *habeas corpus* action, the only remedy, absent a

[9] S. Rep. No. 841, 90th Cong., 1st Sess. 6 (1967). The legislative history of the Act is set forth in detail in Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 Harv. J. Legis. 557 (1972).

federal right of action, would be to seek relief from tribal officials themselves, very possibly the same officials against whom the complaint would lie. We do not believe that Congress intended such an awkward and ineffective result. A civil right of action for declaratory and injunctive relief, after remedies within the tribe have been exhausted, provides a necessary complement to the right of *habeas corpus* specified in 25 U.S.C. 1303.[10]

This Court has frequently held that federal statutes passed to protect classes of citizens, although not expressly authorizing members of the protected class to institute suits, nevertheless implied a private right of action. In *Jones* v. *Alfred H. Mayer Co., supra,* the Court recognized a private right of action for equitable relief under 42 U.S.C. 1982,[11] stating: "[T]he fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy." 392 U.S. at 414, n. 13. Similarly in *Johnson* v. *Railway Express Agency,* 421 U.S. 454, 459–460, the Court found a private right of action for both equitable and legal relief to be implied in 42 U.S.C.

[10] See Note, *The Indian Bill of Rights and The Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343, 1371–1372 (1969).

[11] 42 U.S.C. 1982 provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

1981.[12] In *Allen* v. *State Board of Elections,* 393 U.S. 544, the Court held that a private party could seek a declaratory judgment that a new state enactment was governed by Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. 1973c, and that such a party, after proving that a State had failed to submit a covered enactment for Section 5 approval, could obtain an injunction against further enforcement of the enactment until it was submitted pursuant to Section 5.[13] The Court stated that "[t]he guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." 393 U.S. at 557 (footnote omitted). In *J. I. Case Co.* v. *Borak,* 377 U.S. 426, the Court recognized a cause of action under Section 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, as amended 15 U.S.C. 78n(a),[14] saying

[12] 42 U.S.C. 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[13] Section 5 provides that "no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, Section 5]."

[14] Section 14(a) provides that it shall be "unlawful for any person * * * [to violate] such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

that "[w]hile this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." 377 U.S. at 432. See also *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388; *Chicago & N.W. R. Co.* v. *Transportation Union,* 402 U.S. 570; *Wyandotte Co.* v. *United States,* 389 U.S. 191; *Texas & N.O. R. Co.* v. *Ry. Clerks,* 281 U.S. 548.

Recently in *Cort* v. *Ash,* 422 U.S. 66, the Court identified four factors as "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one," and all those factors support recognition of a cause of action here. First, a plaintiff must establish that he is " 'one of the class for whose *especial* benefit the statute was enacted * * *.' " 422 U.S. at 78 (emphasis in original). As full-blooded American Indians who have lived on the Pueblo reservation virtually all their lives, respondents are members of the class intended to be protected by the Indian Civil Rights Act. Second, regard must be given to "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one" (*ibid.*). While there is no explicit indication here of congressional intent either to create or deny a private remedy, the intention to provide one seems implicit in the statute's language and its pur-

[15] The *Cort* analysis was reaffirmed by the Court in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 37–41.

pose. See pp. 15–16, *supra.* Third, the Court must decide whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." 422 U.S. at 78. As we have indicated (pp. 15–16, *supra*), implying a private cause of action for declaratory and injunctive relief for violations of the Indian Civil Rights Act is not only consistent with the purpose of the Act, but necessary to effectuate that purpose. Fourth, the Court must ascertain whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law" (422 U.S. at 78). Where Indian matters are concerned, Congress has plenary power over the tribal relations of Indians, see, *e.g., Choate* v. *Trapp,* 224 U.S. 665, 671; *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565, and the States, absent congressional authorization, have no jurisdiction over civil disputes arising on reservations between Indian tribes and their members. Cf. *Williams* v. *Lee,* 358 U.S. 217. Thus there is no remedy under state law to which respondents could be relegated.[16]

To support their argument that Congress intended to limit federal jurisdiction to the *habeas corpus*

[16] It might be argued, of course, that the correct inquiry in this context is whether "the cause of action [is] one traditionally relegated" to *tribal* law. Although Indian rights may traditionally have been enforced through tribal courts, Congress was concerned about the adequacy of the rights that Indians historically had enjoyed, and the Indian Civil Rights Act was therefore drafted to provide federal rights, which are commonly the concern of the federal courts.

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proceedings authorized by Section 1303, petitioners rely on inferences drawn from the legislative history. They point out (Br. 17–18) that Congress adopted Section 1303 after rejecting a proposal to provide a trial *de novo* in federal district court for all convicted defendants in tribal courts who alleged that their constitutional rights had been violated. See S. 962, 89th Cong., 1st Sess., introduced February 2, 1965. But the choice of one or another method of review for constitutional attacks on criminal convictions has little to do with whether a private right of action may also exist for declaratory and injunctive relief of a civil nature. While *habeas corpus* may be the exclusive means of redress in the areas to which it applies, it does not foreclose other causes of action that are necessary to protect rights outside its sweep.

Petitioners also rely on the following post-Act remarks by Senator Ervin (Br. 18):

> This bill does not provide for the Federal courts to review all the decisions of the Indian courts. In fact, provision for Federal review was in there originally, and at the request of a number of tribes we eliminated that entirely. The only provision in this bill that provides for Federal court interference is writ of habeas corpus, and that probably exists as law now * * *.[17]

[17] Hearing on Title II of the Civil Rights Act of 1968 (Amendments to the Indian Bill of Rights) before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 15 (1969). After the Act was passed, further hearings were held to consider possible amendments to, and exemptions from, the Act.

While these remarks could be read to suggest a congressional intent to deny a private remedy, we believe that they merely address the means by which direct federal review of tribal criminal proceedings may be had. The "provision for Federal review" of criminal cases by *de novo* trial had been part of the original bill but was later eliminated in favor of the *habeas corpus* remedy. As noted above, that decision indicates no congressional intention to bar all other suits as well.[18]

We therefore believe that the district court had jurisdiction to consider respondents' claims for relief under the Indian Civil Rights Act.[19] There remains the question, however, of the tribe's sovereign immunity.

B. Indian tribes, as quasi-sovereigns, enjoy a traditional immunity from suits without consent. *Puyallup Tribe, Inc.* v. *Department of Game of Washington,*

[18] At the direction of Congress (see 25 U.S.C. 1311; S. Rep. No. 841, *supra* n. 9, at 6), the Secretary of the Interior has published a proposed model code for courts of Indian offenses. See 40 Fed. Reg. 16689. The proposed code deals only with criminal procedures and would apply only in "Courts of Indian offenses" (those established by the Secretary); it would have no binding effect in "tribal courts" (those established by the tribes). Because of its limited application and unenforceability, Congress could not reasonably have intended the model code to be the exclusive means—other than the writ of *habeas corpus*—for guaranteeing constitutional rights for the American Indian.

[19] In addition to the court of appeals in this case, the other courts of appeals that have considered the question have also held that such jurisdiction exists. *E.g.*, *Crowe* v. *Eastern Band of Cherokee Indians, Inc.*, 506 F. 2d 1231 (C.A. 4); *Laramie* v. *Nicholson*, 487 F. 2d 315 (C.A. 9), certiorari denied *sub nom. Tonasket* v. *Thompson*, 419 U.S. 871; *White Eagle* v. *One Feather*, 478 F. 2d

No. 76-423, decided June 23, 1977, slip op. 7; *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512; *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372 (C.C.A. 8). While that immunity can be waived by Congress, the waiver must be explicit. *United States* v. *United States Fidelity & Guaranty Co., supra.*

Although the prohibitions imposed on tribal authority by the Indian Civil Rights Act may be a sufficiently clear waiver of the tribes' immunity, at least insofar as suits for declaratory and equitable relief are necessary to achieve the purposes of the Act,[20] we think it unnecessary to reach that question in this case. Respondents' complaint named as a defendant not only the Pueblo itself but also the Governor of the Pueblo.[21] Even if the Pueblo is immune from suit, respondents may be entitled to an injunction against the Governor prohibiting him from enforcement of an ordinance that violates federal law.

This Court has long held that similar relief is avail-

1311 (C.A. 8). District courts have reached conflicting results. Compare, *e.g.*, *Seneca Constitutional Rights Organization* v. *George*, 348 F. Supp. 48 (W.D. N.Y.), with *Yellow Bird* v. *Oglala Sioux Tribe of South Dakota*, 380 F. Supp. 438 (D. S.D.).

[20] The decisions upholding district court jurisdiction of claims brought under the Indian Civil Rights Act, see n. 19, *supra*, have also held, either by implication or expressly, that the Act abrogates a tribe's sovereign immunity for the purposes of suit under the Act.

[21] By Santa Claran law, the Governor is charged with enforcing the laws of the Pueblo (Pet. App. 2a–3a, 13a).

able against state administrative officials. *Ex parte Young*, 209 U.S. 123. In that case, the Court held that the Eleventh Amendment did not bar a federal suit to enjoin a state attorney general from acting to enforce an unconstitutional state statute, explaining:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. [209 U.S. at 159–160.]

See also *Edelman* v. *Jordan*, 415 U.S. 651, 664. Likewise, tribal officials enforcing laws in conflict with federal law forfeit their official character and the shield of tribal immunity from suit.[22] If the Pueblo ordinance violates the statutory equal protection

[22] Although the court in *Thebo* v. *Choctaw Tribe of Indians*, *supra*, extended immunity to tribal officials, that suit was in essence an attempt to obtain attorneys' fees from the tribal treasury and thus equivalent to a suit against the tribe itself. *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459; *Edelman* v. *Jordan*, *supra*, 415 U.S. at 664. Respondents here seek no relief requiring disbursement of tribal funds.

clause, therefore, its Governor may not enforce that ordinance without becoming subject to suit."[23]

Petitioners also contend (Br. 12–15) that the Act, whatever its scope may otherwise be, does not authorize federal courts to exercise jurisdiction over suits challenging tribal membership determinations. It is true, as petitioners point out (*id.* at 15), that "[t]he courts have consistently recognized that in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership." Cohen, *Handbook of Federal Indian Law* 133 (1942). See also *Roff* v. *Burney*, 168 U.S. 218, 222. But the language of the Act plainly encompasses tribal membership determinations. As indicated, the Act applies to "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed * * *." 25 U.S.C. 1301(2). Nothing in the Act's legislative history evinces a congressional intent to exempt membership decisions from the scope of the Act. To the contrary, the legislators cited as an

[23] Although the Governor is responsible for enforcing Pueblo law, the tribe's constitution vests the authority for determining the membership status of the children of mixed marriages in the Pueblo Council. Respondents seek only to enjoin enforcement of the 1939 ordinance; they have not asked the court to order the Pueblo to accept anyone as members. In these circumstances, naming the Pueblo Governor as a defendant would appear to be sufficient. Should the Court, however, deem the joinder of the Pueblo Council necessary for just adjudication of this case, it may wish to order the Council added as a party pursuant to Rule 21, Fed. R. Civ. P. *Mullaney* v. *Anderson*, 342 U.S. 415.

example of a denial of rights by a tribal government a case in which tribal membership rights were revoked without compliance with due process."[24]

We conclude, therefore, that the district court had jurisdiction of this case.

II.

THE 1939 ORDINANCE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE INDIAN CIVIL RIGHTS ACT

The court of appeals, in appraising the challenged Pueblo ordinance under the equal protection clause of the Civil Rights Act, said it was "conceded" that the ordinance would be invalid if "measured by the Fourteenth Amendment alone" (Pet. App. 42a), but acknowledged that "Fourteenth Amendment standards do not * * * apply with full force" (*ibid.*). The court said that "[t]he interest of the Tribe in maintaining its integrity and in retaining its tribal cultures is entitled to due consideration," and that "where the tribal tradition is deep-seated and the individual injury is relatively insignificant, courts should be * * * reluctant to order the tribal authority to give way" (*ibid.*). But here, the court found, the tribe's asserted interest in "tribal, cultural and

[24] *Martinez* v. *Southern Ute Tribe of Southern Ute Res.*, 249 F. 2d 915 (C.A. 10), certiorari denied, 356 U.S. 960, cited in S. Rep. No. 841, *supra* n. 9, at 10, and in Hearings on H.R. 15419 and Related Bills (Indians: Rights of Members of Indian Tribes) before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess. 17 (1968).

ethnic survival" (*id.* at 43a) did not justify the ordinance, because "there could have been a solution [to the mixed-marriage problem] without discrimination" (*id.* at 44a) and because the discrimination embodied in the ordinance was a policy "of relatively recent origin and so it does not merit the force that would be attributable to a venerable tradition" (*id.* at 45a). Describing the individual Indian's interest in tribal membership as "of great importance" (*id.* at 44a), the court held the ordinance invalid on the ground, evidently, that the sex discrimination it employed was not necessary, or substantially related, to the admittedly important objective of preserving the tribe's cultural and ethnic identity.

Other courts of appeals have taken a similar approach. They have generally agreed that the interest in preserving tribal culture and self-government justifies deviation from the equal protection standards of the Fourteenth Amendment, though they have not agreed on a single test by which to weigh that interest. See, *e.g.*, *White Eagle* v. *One Feather*, 478 F. 2d 1311, 1314 (C.A. 8); *Howlett* v. *Salish and Kootenai Tribes*, 529 F. 2d 233, 238 (C.A. 9). The Eighth Circuit in *Means* v. *Wilson*, 522 F. 2d 833, 842, framed the pertinent inquiry as whether the challenged action was "founded in tribal custom or governmental purpose which would justify modification of traditional equal protection concepts," while the Ninth Circuit in *Howlett* v. *Salish and Kootenai Tribes*, *supra*, 529 F. 2d at 238, asked whether "strict application of traditional equal protection doctrines would signifi-

cantly impair a tribal practice or alter a custom firmly embedded in Indian culture." At least one court of appeals, however, has taken a more deferential view of tribal law under the Act, apparently requiring only that it be applied equally, and with procedural due process, to persons similarly situated. *Crowe* v. *Eastern Band of Cherokee Indians, Inc.*, 506 F. 2d 1231, 1236–1337 (C.A. 4).[23]

We agree with the court below that the equal protection clause of the Indian Civil Rights Act, while derived from the constitutional clause and bearing many of its values, requires a different and special judicial treatment, an interpretation that respects the need to preserve tribal culture, tradition, self-government, and ethnic identity. Where a tribal law or action

[23] We are aware of only one appellate decision, *Daly* v. *United States*, 483 F. 2d 700 (C.A. 8), in which a classification that arguably violated Fourteenth Amendment standards was appraised by the court and said not to violate the equal protection clause of the Indian Civil Rights Act. In *Daly*, the district court ordered the reapportionment of elective districts for tribal elections in accordance with the one-person, one-vote principle. The court also ordered the elimination from its remedial plan of a requirement based on a provision of the tribe's constitution that specified that at least one-half of the councilmen from each district had to be of at least one-half Indian blood. The court of appeals said that this constitutional provision did not violate 25 U.S.C. 1302(8), because "this is one of those 'respects [in which] the equal protection requirement of the Fourteenth Amendment should not be embraced in the Indian Bill of Rights.'" 483 F. 2d at 705. This was *dictum*, however, because the court of appeals declined to overturn the lower court's elimination of the classification from the election plan. The court explained that the blood quantum requirement did not fit the remedial plan, which included two single-member districts. 483 F. 2d at 706.

that would violate Fourteenth Amendment standards does significant injury to the interests of individuals, however, the asserted tribal interests must be appraised to determine whether they justify the discrimination. In the present case, we think the court of appeals correctly concluded that the discrimination against female tribe members and their children embodied in the Pueblo ordinance cannot be justified on the record here by any substantial, or even rational, relationship to the interest in preserving tribal culture and tradition.

A. Under the equal protection clause of the Fourteenth Amendment, legislative enactments that discriminate between individuals or classes are not invalidated *per se,* but are assessed in terms of the basis and need for the distinction and the individual interests affected by it. Legislative classifications that do not affect fundamental rights are normally upheld as long as they do not make distinctions deemed unusually suspect or sensitive and as long as they bear a rational relationship to a permissible legislative goal. If the objectives of an enactment are legitimate state purposes, "[t]he Equal Protection Clause requires only that the distinction drawn * * * rationally promote the regulation's objectives." *County Board of Arlington County, Virginia* v. *Richards,* No. 76–1418, decided October 11, 1977, slip op. 3. Such deference has not been accorded, however, when the distinction drawn by the legislature creates a suspect classification—one based on race, alienage, or illegitimacy, for example—or impinges on fundamental, constitutionally protected rights. See *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 40. Thus, before a discrimination based on alienage is permitted to stand, "the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." *Examining Board* v. *Flores de Otero,* 426 U.S. 572, 605; *Nyquist* v. *Mauclet* No. 76–208, decided June 13, 1977.

In relatively recent years, legislative distinctions based on gender have come under progressively more critical judicial examination. With respect to the role of women in society, the courts are now discarding, and requiring legislatures to discard, "the role-typing society has long imposed." *Stanton* v. *Stanton,* 421 U.S. 7, 15. The result has been invalidation of statutes based on "old notions," *id.* at 14, on "archaic and overbroad generalizations," see *Schlesinger* v. *Ballard,* 419 U.S. 498, 508, and on "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'" *Craig* v. *Boren,* 429 U.S. 190, 198–199. Legislatures today, instead of relying on these discredited assumptions, have been required to "choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact." *Id.* at 199.

To be upheld under present Fourteenth Amendment standards, classifications on the basis of sex "must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig* v. *Boren, supra,* 429 U.S. at 197. Discriminations that merely serve "administrative ease and convenience," or that employ "gender as an inaccurate proxy for other, more germane bases of classification," *id.* at 198, are no longer to be tolerated.

We have no doubt that the Pueblo ordinance at issue here would fail to survive scrutiny under the Fourteenth Amendment standard set forth in *Craig* v. *Boren, supra* (see the discussion at pp. 37–42, *infra*). But in interpreting and applying the equal protection clause of the Indian Civil Rights Act, we must make further inquiries. We must consider whether Congress intended the Act to impose on Indian communities the same standards and the same results that flow from equal protection analysis under the Fourteenth Amendment, or whether certain peculiarly Indian interests may justify discriminations under the Act that state interests in non-Indian society could not justify under the Constitution.

B. The guarantees of the United States Constitution that protect individual rights against actions of the Federal and State governments have been considered not to regulate the exercise of governmental authority by Indian tribes. *Talton* v. *Mayes,* 163 U.S. 376; *Native American Church* v. *Navajo Tribal Council,* 272 F. 2d 131 (C.A. 10); see also *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation,* 259 F. 2d 553 (C.A.

8.) But see *Colliflower* v. *Garland,* 342 F. 2d 369 (C.A. 9). In the Indian Civil Rights Act, Congress has acted to provide such protection for the individual rights of Indians. Among the guarantees of the Act is the provision (25 U.S.C. 1302(8)) that "[n]o Indian tribe in exercising powers of self-government shall * * * deny to any person within its jurisdiction the equal protection of its laws * * *."

The equal protection clause of the Act follows almost verbatim the language of the Fourteenth Amendment, the only change being substitution of "equal protection of its laws" for "equal protection of the laws." Some *amici curiae* ascribe great significance to this change (*e.g.*, Brief of the National Tribal Chairmen's Association 15–29), finding in it a congressional intent to require only equal application of the tribal laws, not equal protection in the content of those laws as well. We believe the absence of supporting legislative history to be strong evidence that no such novel construction was intended.[20] It makes little sense to suppose that Congress, in its effort to provide greater protection for individual rights, would tacitly endorse the passage of discriminatory laws so long as no individual exceptions were made to those laws. If Congress had contemplated such a departure from established equal protection principles, it could have been expected to indicate this intent in the statute, or to provide some evidence in the legislative history, or at least to refrain from

[20] A 1966 summary report of a Senate subcommittee does contain a statement that the equal protection clause in a substitute bill

misleadingly tracking the language of the traditionally freighted constitutional clause.[27]

While the legislative history of the Act reflects no intent to jettison basic understandings of equal protection, it does show congressional concern for the preservation of traditional Indian culture.[28] To be sure, the Act was designed to impose certain contemporary non-Indian values on Indian tribes, largely

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offered by the Department of the Interior was "in some respects" narrower than the equal protection clause of the Fourteenth Amendment. Constitutional Rights of the American Indian, Summary Report of Hearings and Investigations by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Pursuant to S. Res. 194, 89th Cong., 2d Sess. 25 (Committee Print 1966). The Interior Department's substitute bill provided that "[n]o Indian tribal government shall deny *to any member of the tribe* within its jurisdiction the equal protection of its laws." Hearings on S. 961, etc. (Constitutional Rights of the American Indian), before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 318 (1965) (emphasis added). Since the Fourteenth Amendment prohibits a state from denying equal protection of the laws "to any person within its jurisdiction," the coverage of that bill indeed would have been narrower than the coverage of the Amendment. The final version of the Indian Civil Rights Act, like the Fourteenth Amendment and unlike the substitute bill, guarantees equal protection of a tribe's laws "to any person within its jurisdiction."

[27] Senator Ervin, the chief sponsor of the Act, implied no such innovation when he stated during the Senate floor debate that its purpose was "to confer upon the American Indians the fundamental constitutional rights which belong by right to all Americans." 113 Cong. Rec. 33472 (1967).

[28] See, *e.g.*, the following language from the Senate Subcommitte's 1966 Summary Report, *supra* n. 26, at 9 referring to S. 961, 89th Cong., 1st Sess., the bill from which the Indian Civil Rights Act evolved:

though not exclusively in the area of criminal justice; but unlike the efforts to introduce white values to tribal Indians in the late nineteenth and early twentieth centuries, the Act's purpose was not to foster assimilation of the Indians but to assure responsible exercise of their tribal independence. Consistently with "[t]he overriding purpose of [the Indian Reorganization Act of 1934] * * * to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically," *Morton* v. *Mancari*, 417 U.S. 535, 542, the Indian Civil Rights Act by its terms contemplates that Indian officials will administer tribal affairs and enforce tribal laws and that tribal courts will be the primary forum for adjustment of tribal disputes. While the Act significantly delimits tribal authority in some respects, it was designed to allow breathing space for traditional values that are at the heart of tribal culture and self-government.[29]

"The most serious objections to S. 961 took the form neither of objection to the purposes of the bill nor quarrel with the sundry allegations of the practice o[r] possibility of denial of rights by tribal governments. Instead, as numerous witnesses pointed out, the peculiarities of the Indian's economic and social condition, his customs, his beliefs, and his attitudes, raised serious questions about the desirability of imposing upon Indian cultures the legal forms and procedures to which other Americans had become long accustomed."

[29] See Note, *supra* n. 10, 82 Harv. L. Rev. at 1368; Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 Harv. J. Legis. 557, 617 (1972); Note, *Equal Protection under the Indian Civil Rights Act: Martinez* v. *Santa Clara Pueblo*, 90 Harv. L. Rev. 627, 631–632 (1977). Thus, Congress was selective in deciding which constitutional rights were to be guaranteed to American

The special character of Indian society has been recognized and respected by this Court on numerous occasions. "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832); they are 'a separate people' possessing 'the power of regulating their internal and social relations * * *.'" *United States* v. *Mazurie*, *supra*, 419 U.S. at 557. Although federal legislation may treat tribal Indians differently from non-Indians, "federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *United States* v. *Antelope*, 430 U.S. 641, 646. Because of this "unique status," federal legislation affecting the interests of tribal Indians is not judged by the stricter scrutiny given to racial classifications (see p. 28, *supra*), but is upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

Indians vis-a-vis their tribal governments. The earlier bill, S. 961, provided that "any Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution." This approach was rejected in favor of the specification of particular guarantees because of concern that the Fifteenth Amendment's guarantee of equality of voting rights and the First Amendment's Establishment Clause would conflict with tribal blood-quantum requirements for membership and voting and would endanger the continued existence of Pueblo theocracies. See, *e.g.*, 1965 Hearings *supra* n. 26, 65, 221.

Morton v. *Mancari*, *supra*, 417 U.S. at 555. That unique status should also be a relevant factor in assessing tribal legislation under the equal protection clause of the Indian Civil Rights Act.[30]

In the variable balancing process familiar to equal protection analysis, special Indian interests might be protected under the Act by at least two different approaches. The standard of review might be adjusted to accord greater deference to tribal actions than is accorded to legislative judgments under the Fourteenth Amendment—so that all tribal actions were reviewed by the "rational basis" test, for instance, even when they impinged on fundamental rights or created suspect classifications. Alternatively, special weight might be given to Indian values in determining whether a particular tribal action meets the established equal protection standard that is applicable—whether the action rationally promotes a legitimate tribal objective, or is substantially related to an important objective, or survives the stricter scrutiny required when fundamental rights are affected or suspect classifications created. The latter approach seems preferable to us in reconciling the important individual and tribal values reflected in the Indian Civil Rights Act. The established Fourteenth Amendment standards are sufficiently flexible to accommodate in their application the special interests

[30] For example, the Act should not preclude the Pueblo from denying membership to persons whose parents were not Pueblo members, or to persons with less than a specified proportion of tribal ancestry. See *Morton* v. *Mancari*, *supra*.

of Indian tradition and culture that need consideration under the Act. And a further proliferation, or subdividing, of equal protection standards seems better avoided if possible. Cf. *Craig* v. *Boren, supra,* 429 U.S. at 219–211, n.* (concurring opinion of Justice Powell).[31]

At the least, therefore, when tribal legislation imposes different treatment on persons or classes of persons, the classification must bear a rational relationship to the achievement of a legitimate tribal purpose.

[31] Another possible approach, a variant of the first, would involve holding temporally constant the equal protection standards that are applicable under the Act, declining to update them to keep step with evolving notions of equal protection in non-Indian society when those new notions have no counterpart in Indian culture. Thus, if the changed conceptions of women's role in society that underlie this Court's recent willingness to scrutinize more closely discriminations based on sex, see *Craig* v. *Boren*, *supra*, 429 U.S. at 198–199, have no parallel in tribal Indian society, it might be argued that the tolerant standard of review formerly applied to sex discrimination under the Fourteenth Amendment should still be applied to tribal legislation under the Act. Such an approach, however, would present difficult problems of determining whether there has in fact been any parallel development within tribal society and, if not, of dating and identifying the older constitutional standard to be applied. Like the first approach, it would lead to an unwieldy proliferation of equal protection standards, with the added complication of differences over time. To the extent that the role of women in tribal society today is different from what it is in non-Indian society, we think such differences are better taken into account under the second approach—as special aspects of Indian culture or tradition to be given weight in applying the same equal protection standards that presently prevail in non-Indian cases. Such an approach can give due recognition to the reality that changing attitudes in non-Indian society may not be reflected in the cultural and social values of tribal society, and indeed may be at war with those values.

Further, when a distinction drawn by tribal action impinges on fundamental individual rights, creates a suspect classification, or otherwise would attract close scrutiny under established equal protection analysis, we believe the tribe must show that tribal interests justify the discrimination under the accepted standard.[32] The Pueblo ordinance in the present case discriminates on the basis of gender. Under prevailing equal protection standards, such a classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren, supra,* 429 U.S. at 197. We believe the tribe bears the burden of showing that the ordinance meets at least this test.[33] We further believe the Santa Clara Pueblo has not made such a showing.

C. The Pueblo ordinance discriminates strictly on the basis of sex, penalizing both Julia Martinez and her children because Julia Martinez is a woman

[32] The justifying interests might be ones that would in other contexts be offensive to the Fourteenth Amendment, such as preservation of blood lines or tribal religions. See n. 29, *supra*.

[33] Since the ordinance deprives the children of Julia Martinez of the political rights that come with membership in the Pueblo (Pet. App. 17a), it may demand closer scrutiny as a discrimination that impinges on fundamental rights. See, *e.g.*, *Dunn* v. *Blumstein*, 405 U.S. 330, 336–337. We consider it unnecessary to reach this issue, however, since in our view the sex discrimination embodied in the ordinance is impermissible under the standard of *Craig* v. *Boren*.

The gender discrimination is not ameliorated, in its application to the children of Julia Martinez, by the fact that it turns not on their sex but on the sex of their parent. Cf., *e.g.*, *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172–176, dealing with classifications based on illegitimacy.

rather than a man. As a female Pueblo member who has married outside the tribe, Julia Martinez is not entitled—while a male Pueblo member is entitled—to pass to her children her house and her land use rights and the right to be a member of the tribe.[34] The children of Julia Martinez are denied membership in the Pueblo because they are the children of a Santa Claran woman who entered into a mixed marriage, while the children of a Santa Claran man who entered into such a marriage are granted membership by the ordinance. The result of the ordinance thus is not only a "mandatory preference to members of either sex over members of the other," *Reed* v. *Reed,* 404 U.S. 71, 76, but an absolute disqualification of women for rights granted to men. Such a discrimination is, at the least, "subject to scrutiny under the Equal Protection Clause," *Reed* v. *Reed, supra,* 404 U.S. at 75; "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren,* 429 U.S. 190, 197; see *Reed* v. *Reed,* 404 U.S. 71; *Stanton* v. *Stanton,* 421 U.S. 7; *Weinberger* v. *Wiesenfeld,* 420 U.S. 636; *Frontiero* v. *Richardson,* 411 U.S. 677.

[34] Thus the ordinance also discriminates against Pueblo women by impinging on their choice of a marriage partner, penalizing them (but not Pueblo men) for marrying outside the tribe. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 639–640. *Cf. Loving* v. *Virginia,* 388 U.S. 1, 12; *Moore* v. *City of East Cleveland, Ohio,* No. 75–6289, decided May 31, 1977, slip op. 4–11 (plurality opinion).

Moreover, the ordinance works a significant hardship on Julia Martinez and her children. Denial of Pueblo membership means that the children are denied the right to vote and other political rights in the tribe;[35] they are denied the material benefits of Pueblo membership, including succession to the land use rights held by their mother; and unless another relative takes them in, they will not be entitled (although they may be allowed) to continue living at the Pueblo after their mother dies (Pet. App. 17a–18a). Their association with the Pueblo, at which they have lived all their lives, is therefore placed in continuing jeopardy.[36]

Petitioners contend that the ordinance is necessary to preserve the Pueblo's culture, both by preventing an influx of population lacking that culture as Pueblo members and by preserving the role of Pueblo men in carrying on the culture (Br. 28–29). They cite the testimony of Paul Tafoya, Governor of the Pueblo at the time of the trial, and of Dr. Florence Hawley Ellis, an anthropologist, to the effect that the Pueblo culture would eventually be destroyed if the ordinance was not enforced (*ibid.;* Tr. 116–117, 251). If this testimony is correct, the ordinance would be substantially related to the achievement of an important tribal objective and therefore might well be consistent with the equal protection clause of the Act, its discriminatory impact on respondents notwithstanding.

[35] See p. 7, *supra.*

[36] Cf. *Moore* v. *City of East Cleveland, Ohio,* No. 75–6289, decided May 31, 1977, slip op. 4–11 (plurality opinion).

In our view, however, the court of appeals correctly discounted this testimony.

The classification mandated by the ordinance does not bear a substantial relationship, or even a rational one, to the preservation of the Pueblo's culture. The ordinance excludes from membership full-blooded Indians like the Martinez children who live at the Pueblo and participate in its culture, religion, and daily life, while bestowing membership on persons who may never see the Pueblo in their lifetimes.[37] As the court of appeals observed (Pet. App. 43a):

> The children of Julia and Myles Martinez are 100 percent Indian and 50 percent Santa Claran. They speak the language of the Santa Clara Pueblo, namely, Tewa. They practice the customs of the Tribe and are accepted into the Tribe's religion; nevertheless, they are denied membership and face exclusion with attendant loss of rights of inheritance, residency and voting, together with ability to pass tribal membership to their offspring, solely because their mother rather than their father is a Santa Claran. Compare this with the rights that are accorded the male member of the Santa Clara Pueblo. Even if he marries outside the Pueblo one who is not an Indian, and even though his family resides outside the territory of the Tribe, the offspring are entitled to tribal membership. The Tribe has not shown how such an incongruous and unreasonable result fosters and promotes cultural survival.[38]

[37] Approximately 150 members reside off the Pueblo, "one-third of them in other locations in New Mexico, and the rest scattered across twenty-two different states" (Pet. App. 14a).

[38] See Note, *supra* n. 10, 82 Harv. L. Rev. at 1362.

Insofar as the ordinance is defended on the basis of the need to limit the tribe's population, particularly with respect to the sudden increase in mixed marriages in the 1930's (Pet. App. 20a, 44a), the court of appeals correctly recognized (*id.* at 44a) that the Pueblo could have solved this economic problem without resort to discrimination. It could have continued its practice of determining the membership status of children of mixed marriages on an individual basis (*id.* at 29a–30a), or it could have excluded the children of all mixed marriages from membership, or it could have adopted a residence test or some comparable non-discriminatory criterion for identifying those children of mixed marriages who deserved membership. Any of these approaches would have dealt with the population problem while providing at least as much regard as the ordinance provides for the cultural affinity of any children of such marriages who were granted membership in the Pueblo. Any of these approaches would have avoided resorting, as the ordinance resorts, to discrimination based solely on sex and not on the culture, the attitude, the residence, or any other relevant attribute of the persons admitted to membership. If an advantage of "administrative ease and convenience" can still be claimed for the approach to the population problem taken by the ordinance, there is no reason why that objective should be any more valid in justifying sex discrimination by an Indian tribe than it has been held to be when asserted on behalf of a non-Indian government. *Craig* v. *Boren*, *supra*, 429 U.S. at 198.

Nor is the ordinance justified by the traditional "importance of men" (Pet. Br. 28 (testimony of Dr. Ellis)) in training children in the Pueblo culture. Although such "role-typing" has been rejected in equal protection analysis under the Fourteenth Amendment (*Stanton* v. *Stanton*, 421 U.S. 7, 15), we recognize that it is the kind of cultural value that might nonetheless justify sex discrimination under the Act if it were shown to be an authentic tribal tradition whose preservation substantially depended on the discriminatory enactment. Here, however, there is no such showing. As the court of appeals found, "historically the 1939 ordinance cannot be said to represent the Santa Clara tradition" (Pet. App. 44a). Before the ordinance was adopted, the membership status of children of mixed marriages was determined by the tribe on a case-by-case basis (*id.* at 21a, 29a–30a), and in several instances membership was granted to children of such marriages in which the mother was the member of the Pueblo (*id.* at 30a).[39] The role of men in teaching children the Pueblo tradition has not been limited to their own children; with respect to illegitimate children born of Pueblo women, the role has traditionally been fulfilled by having male relatives help the mother in-

[39] The Constitution adopted by the Pueblo in 1935 contained no discrimination such as the ordinance instituted four years later; rather, it stated that membership in the Pueblo would include "[a]ll children of mixed marriages between members of the Santa Clara pueblo and nonmembers, provided such children have been recognized and adopted by the council" (Article II, Section 1(c), A. 2). See n. 3, *supra*.

struct her children in the Pueblo's customs (Tr. 145). The Martinez family itself is compelling evidence that children can assimilate Pueblo culture without the benefit of a Santa Claran father."[40]

d. Finally, petitioners contend that "the absolute discretion of an Indian tribe to determine the requirements for enrollment in the tribe is as broad as that of the United States to determine the requirements for citizenship" (Br. 30). They rely on *Fiallo* v. *Bell*, 430 U.S. 787, in which this Court stated that immigration legislation involves "policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress" (slip op. 11).

For two reasons, the analogy is inapposite. Indian tribes, though quasi-sovereign nations, are subject to the plenary authority of Congress. And Congress, as we have noted (pp. 24, 30–32, *supra*), in passing the Indian Civil Rights Act decided to subject tribal membership decisions to equal protection requirements. Second, *Fiallo* was an immigration case, dealing with

[40] Compare Note, *Equal Protection under the Indian Civil Rights Act: Martinez* v. *Santa Clara Pueblo*, 90 Harv. L. Rev. 627 (1977). The conclusion that the Santa Clara ordinance violates the statutory equal protection clause does not mean that all tribal laws having membership provisions based on the father's or mother's blood line necessarily do so. As indicated in our memorandum filed at the petition stage (p. 9, n. 9), Department of the Interior records indicate that at least thirteen other Indian tribes have such membership requirements. Whether the rules of those tribes violate the Act will depend on the particular circumstances in each case.

the relationship between the United States and conceded aliens. The relationship between the Pueblo and the Martinez children is markedly different. The Martinez children were born of a Pueblo mother, residing on the reservation, and have lived at the Pueblo virtually all their lives. They are therefore more comparable to "persons born * * * in the United States," who are citizens at birth under the terms of the Fourteenth Amendment.[41]

[41] The Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

With respect to children born *outside* the United States to parents of whom one is a citizen and one is not, the United States until 1934 made a distinction similar to that of the Pueblo ordinance, granting citizenship if the father was the citizen but not if the mother was. See *Montana* v. *Kennedy*, 366 U.S. 308. Such a law would presumably be invalid under the Fifth Amendment today. See *Craig* v. *Boren*, 429 U.S. 190; *Reed* v. *Reed*, 404 U.S. 71; *Schneider* v. *Rusk*, 377 U.S. 163. Since 1934, the United States has maintained a residence requirement as a condition to the citizenship of children born abroad of such marriages. See *Rogers* v. *Bellei*, 401 U.S. 815.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977